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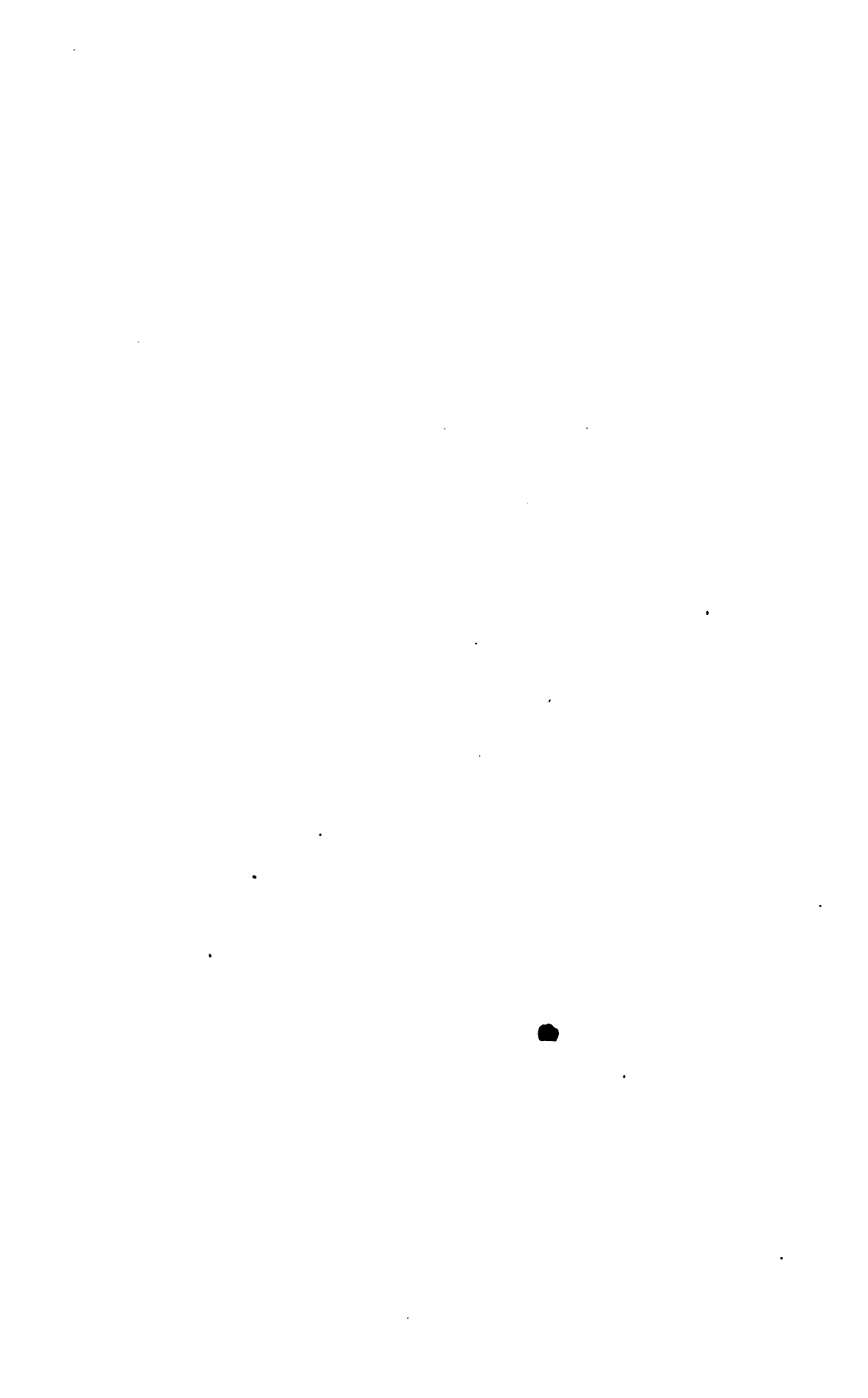


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LOWER CANADA
Law Journal.

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CONTENTS.

PAGE.	PAGE.
Proposed Changes in the Act respecting the Bar.....	Contempt of Court..... 121
Interest and Usury..... 1	The Queen v. James Mack..... 122
Judicial Labour..... 3	The Bar of Lower Canada..... 123
Court of Appeals, March Term..... 4	Habeas Corpus..... 124
The Chief Justiceship of the Superior Court..... 5	Lord Cranworth..... 124
The Habeas Corpus Act..... 5	Chief Justice Lefroy..... 125
Act against Lawless Aggressions..... 6	Miscellaneous Items..... 126
The English Law Courts..... 7	Appeals <i>in forma pauperis</i> 145
Law Journal Reports, 10, 29, 59, 79, 104, 126, 151, 182, 199, 222, 246, 270	Contempt of Court..... 145
Recent English Decisions, 24, 44, 72, 91, 114, 135, 168, 173, 216, 240, 254, 288	Chief Justice Erle..... 147
Private Executions..... 24	Sir James L. Knight Bruce..... 148
The Code of Civil Procedure..... 25	The Trial of Lamirande..... 148
Inspection of Registry Offices..... 28	Bar of Lower Canada..... 150, 220
Notarial Deeds not countersigned..... 28	Digest of English Law..... 151
The Ottawa District..... 29	Authority of Council..... 169
Mode of conducting Executions..... 29	Retainers..... 169
The Upper Canada Law List..... 29	Legal Expenses in England..... 171
The Judge of the Ottawa District..... 49	Reporting Extraordinary..... 192
Facilities for rendering Judgments..... 54	Bankruptcy—Assignments, &c., 192, 198, 220, 245, 269
A prisoner in the House of Assembly..... 56	The Insolvent Act..... 193
Actions in Ejectment..... 58	Instructions as to Costs..... 196
The New Registration Duties..... 59	Post Office Regulations..... 197
Legal Appointments..... 59	The Ramsay Contempt Case..... 217
Bills withdrawn..... 72	The Royal Insurance Company v. Knapp..... 219
The County of Two Mountains..... 72	The Confederate Cotton Loan..... 219
The Extradition of Lamirande..... 73, 97	County of Megantic..... 219
Law Reporting..... 76	Contempt of Court.—The McDermott Case..... 241
New Trial for Felony..... 77	Action <i>qui tam</i> 243
Magic and Witchcraft..... 78	The Judiciary of Lower Canada..... 265
Judge Advocate Holt..... 96	The British North America Act..... 266
Punch's Legal Intelligence..... 96	Ramsay v. Regina..... 267
The Grand Jury System..... 98	The Lower Canada Reports..... 268
The Price of Justice..... 99	Agreeing to disagree..... 270
Notices of New Publications..... 101, 197	The Court of Revision at Montreal..... 270
Summary of Current Events..... 101	Annual Report of the Council of the Montreal Bar..... 285
The Montreal Bar—Admissions to Study and Practice..... 102	Brougham's Advice to Macaulay..... 288
Chief Baron Pollock..... 103	Table of Cases Reported..... 289
	Index to Law Journal Reports..... 291
	Index to English Decisions..... 297
	Index to Miscellaneous..... 299

LOWER CANADA LAW JOURNAL.

A separate Index has been prepared to the Reports of Cases decided in Lower Canada, and also to the Selections from the English Law Reports. The following is the

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No. 1.

**PROPOSED CHANGES IN THE ACT
RESPECTING THE BAR.**

A step has at last been taken towards amending the Act incorporating the Lower Canada Bar. At a special meeting of the Montreal section, on the 16th May, a Committee was appointed to take into consideration certain resolutions which had been submitted, and to make any necessary or desirable alterations in the Act and by-laws at present in force. This Committee, of which Mr. R. MACKAY was chairman, reported, on the 9th June, to a general meeting of the bar, which was adjourned till the 16th, for the consideration of the report. The gist of the proposed changes may be stated as follows: To raise the standard of qualification for candidates desirous of being admitted to the study and practice of the profession; to increase the fees payable on admission to study and to practice; to purge the bar of felons, criminals, and others, who, by disgraceful and unworthy conduct, reflect disgrace upon the profession; to take away the right of attacking the judgments of councils of sections, by *certiorari*, or appeal to the civil courts, and to restrict appeals solely to the general council; to substitute a semi-annual examination of candidates for a monthly one, as at present; to make the treasurer the direct receiver of all fees payable to the bar, and otherwise to provide checks for the proper administration of the finances.

Some of these changes, it will be perceived, are of considerable importance, and it was, therefore, with regret that we observed such a small attendance of members at the general meetings called to discuss the report. On the 16th June, the only senior members of the profession present were Mr. A. ROBERTSON, Q. C., Batonnier, Mr. DOUTRE, Q. C., Mr. MACKAY, Mr. RITCHIE, Mr. CASSIDY, Q. C., Mr. W. DORION, and Mr. DORMAN. At the adjourned meeting, on the 18th, there were present, during the first half of the session,

only Messrs. ROBERTSON, Q. C., DOUTRE, Q. C., and MACKAY, from among the senior members of the profession. Subsequently Messrs. LAFLAMME, Q. C., RITCHIE, POMERVILLE, W. ROBERTSON, and others, participated in the discussion. We mention these names to show that although there are few members of the bar who have not advocated reform, yet when a move is made in the desired direction, a lack of zeal is manifested in carrying out the projected improvements. There was not much difference of opinion on the changes suggested in the report, with a few exceptions which we shall here notice. First, as to the frequency of examinations, it was represented, and we think with reason, that a semi-annual examination may often subject worthy and thoroughly prepared candidates, whose term of studentship expires immediately after an examination, to a delay of nearly six months, before they have an opportunity of presenting themselves. Besides this, as the time and attention of the examiners are generally fully occupied with their professional engagements, it may be difficult to get gentlemen to sit day after day, perhaps for a whole week, engaged in the tedious task of examining some thirty or forty candidates for admission to practice, and investigating the qualifications of those desirous of being admitted to study. The proposition for a semi-annual examination, however, was carried by 11 to 5.

That part of the report which proposed that the Prothonotary should keep an independent register of diplomas, as a check upon the treasurer, was struck out entirely, but all moneys due to the council of the section are in future to be paid directly to the treasurer, and not through the secretary. As to qualification of candidates, it has been resolved, that students must be articulated to a practising advocate during four consecutive and entire years, and also follow a complete course at an incorporated college or university during three years. This makes the *minimum* term of studentship four years, instead of three, as at present. Some amendments were proposed with the object of fixing a *minimum* number of lectures on each subject, but these stipulations were, by a large majority, voted uncalled for, and derogatory to the dignity of the colleges, which should be

left to govern these matters as in their wisdom they see fit. Indeed, for our own part, we are disposed to go farther, and say that it is injudicious to define too strictly the courses and lectures to be followed by young men preparing for the bar. For there are some who, with the most ample opportunities and the greatest amount of 'cramming', will retain their original stolidity, while others, with the most scanty opportunities, and attention distracted by other occupations, are, nevertheless, of such intellectual calibre, and are possessed with such an insatiable and devouring thirst for the acquisition of knowledge, that in solid results they will far outstrip their contemporaries. Holding these sentiments, it was with no little astonishment we observed in the report, an affidavit to be made by every candidate for admission to practice, to the effect that during the four years of his studentship he had pursued his studies *jour par jour*, without interruption, and "*que pendant les quatre années de sa cléricature, il ne s'est pas occupé d'aucun autre objet soit lucratif ou gratuit qu'à l'étude de la profession d'avocat.*" There is an old saying, 'that all work and no play makes Jack a dull boy,' and, according to the foregoing affidavit, the luckless student could not absent himself for a day from the office, could not relieve theedium of legal study by improving his acquaintance with classics, with modern languages, or with science, nor could he divert his mind with music, or drawing, or painting, nor, which in many cases would be more important, do anything towards earning his own livelihood, during the entire period of four years. We have no doubt that the affidavit was drawn up with the best intentions, to prevent students from acting (as it was stated that they sometimes do) as *recors*, or in other unworthy capacities. But it is necessary to take heed, in framing rules, to keep up the *dignity* of the profession, that we do not degenerate into what is snobbish and ridiculous. It is well known that many of those who have cast the brightest lustre on the English bar, have won their way from low estates. Take, for instance, the following paragraph, which sometime ago went the round of the press, and which, with some

inaccuracies, is, we think, substantially correct:—

"Lords Eldon and Stowell—sons of a barge-maker and small coal dealer at Newcastle. Lord Tenterden—son of a barber at Canterbury; he received a very poor education, but obtained the means to go to college; while there, he enjoyed, from a company in the city of London, an exhibition of £3 per year until he took his degree. Lord Gifford—prior to his being called to the bar, was many years a poor clerk to a solicitor near Exeter. Lord Langdale, the master of the rolls, was many years a poor practising surgeon. Sir John Williams, one of the judges of the Queen's bench—son of a very poor horse dealer in Yorkshire. Lord Truro, son of a very poor man in Cornwall, married a first cousin of Queen Victoria. Mr. Baron Gurney—his mother kept a small bookstore for pamphlets in a court in the city of London. Lord Campbell, the present Lord Chancellor, was for many years reporter to the *Morning Chronicle*. Lord St. Leonards—son of a barber, and was formerly a clerk. Chief Justice Saunders, whose precepts to this day form the best text book to pleaders, was a beggar boy, first taken notice of by an attorney, who employed him in his office. Lord Kenyon—boot black and errand boy. Lord Hardwicke—an errand boy. George Canning—son of a poor strolling player."

And the same is true of American and French lawyers. This view of the case was endorsed by the meeting, which rejected the part of the affidavit cited by a large majority.

As to the fees payable by candidates, the fee for admission to study was increased from *five to twenty* dollars, and the fee for admission to practice, from *fourteen to fifty* dollars. This is a good change, not because it is desirable to open the door of the profession only to the rich, but because the increase is not sufficient to be any real impediment to those seriously bent on following the law as their profession, while it will be sufficient to bring in a large addition to the revenue available for the purchase of books, &c. Thus every *fifty* candidates admitted to study, will add \$1000 to the fund of the section, and every *twenty* admitted to practice, a like sum.

The annual contribution is to remain for the present at \$6, but stringent provisions have been adopted, for the purpose of striking off the roll of members any one who allows the fee to remain unpaid during three consecutive years;—a salutary rule, which will require firmness and resolution on the part of the council to enforce it.

Such are the leading changes proposed. There may be differences of opinion on some points, but on the whole, the act as amended will be an improvement on the old one, and we trust to see it speedily become law. The thanks of the profession are due to those who worked on the committee, including Mr. G. W. STEPHENS, and the secretary, Mr. GORZALVE DOTRE, who took a special interest in the task, and suggested several of the improvements. The bill has, we understand, been confided to the care of Atty. General Cartier.

INTEREST AND USURY.

It is with regret that we observe several attempts have been made to repudiate liability to banks, on the ground of usury. We published one instance, p. 72, 1 L. C. Law Journal; and, since the date of that decision, there have been several other cases which have been decided by the jury adversely to the banks, on the ground that the extra $\frac{1}{4}$ or $\frac{1}{2}$ per cent. charged by the banks was usurious.

The clause of the statute under which this extra rate is sought to be imposed, (C. S. C. c. 58, s. 5,) reads as follows:—"Any bank or banking institution, carrying on business as such in this Province, may, in discounting, at any of its places or seats of business, branches, agencies or offices of discount and deposit, any note, bill or other negotiable security or paper, payable at any other of its own places or seats of business, branches, agencies or offices of discount and deposit within this Province, receive or retain, in addition to the discount, any amount not exceeding the following rates per centum, according to the time it has to run, on the amount of such note, bill or other negotiable security or paper, to defray the expenses attending the collection of such bill, note or other negotiable security or paper, that is to say, under thirty days, one-eighth of one

per cent.; thirty days and over, but under sixty days, one-fourth of one per cent.; sixty days and over, but under ninety days, three-eighths of one per cent.; ninety days and over, one-half of one per cent."

Juries have differed, and found sometimes for the plaintiff and sometimes for the defendant. We trust that by the decision of the Court of Appeals, it may be decided that such discount is not usurious. Even assuming that this per centage is not chargeable within the letter of the law, it is impossible to feel any sympathy with attempts to evade liability manifestly made in bad faith.

Perhaps, however, it is rather to be desired that the decision of the Courts should be the reverse, and that the law should be rigorously interpreted against the banks. For this would undoubtedly lead to a determined effort to efface from the statute book those injudicious restrictions on the loan of money, which yet remain. The discussion of the subject would be renewed, and further discussion would probably dissipate many of the existing crude conceptions on the subject of interest. The public would become sensible of the fact, that the price, or remuneration, of loans of money, like the price of most other articles, is determined by the law of supply and demand. If there be a large amount of money to be lent, while the requirements of borrowers are inconsiderable, the price will tend downwards; but if the amount to be lent is small, and the demands of the borrowers great and urgent, the price of money will as naturally tend upwards; the proportion between the amount to be lent and the demands of the borrowers being regulated, in a great measure, by the amount of wealth and the amount of enterprise. The amount to be lent, or the loanable capital, is of course diminished by increased facilities for the safe employment of capital in other ways, as by investment in joint stock companies with limited liability, in Government securities, or in foreign markets. The capitalist will not lend unless he can make the same *net* profit by lending that he would if he employed his money in other ways; and it requires little reflection to perceive, that if the Government fixes a rate lower than this, or if, as in ancient times, opprobrium is cast upon the lender,

the person whose necessities compel him to borrow, will find the terms on which he can do so only the harder. For if the law forbids the capitalist to accept what he conceives to be a fair rate, he is impelled to adopt one of two courses; either, to desist from lending at all, (and thus still further diminish the amount of "loanable capital" in the community,) or he will resolve to incur the risk of penalties by lending at a rate above what is legalized; and, in order to indemnify himself for this risk, he will demand a rate higher than what would have satisfied him, had the transaction been under the sanction of law.

But, it has been urged, usury is prohibited by Scripture, and passages, such as Lev. xxv. 36, Deut. xxiii. 19, Ps. xv. 5, Ezek. xviii. 8, and Luke vi. 35, are cited in support of the view. It is abundantly evident, however, that usury meant formerly any interest exacted by the lender from the borrower solely as the price of the loan; so that this argument, if applicable at all, would prohibit any interest whatever from being received. Among the ancients, in fact, it was commonly held that the loan of money at interest was an illicit way of acquiring wealth. "All money is sterile by nature," said Aristotle, and therefore profit cannot be expected from it. This idea long remained rooted in men's minds. The lender was held up to public detestation on the stage. All lending at interest was held to be unlawful and dishonest, and one of the reasons that has been assigned for the ruthless persecution of the Jews, is the fact that the occupation of lending was for a long time chiefly exercised by them.

At length, however, the utter ignorance of the laws that regulate the increase of wealth began to be dissipated. It gradually came to be understood that borrowing, in one form or another, is necessary for many industrial and commercial enterprises. About the beginning of the 16th century, the distinction between interest and usury was introduced, and Calvin, among other theologians, maintained that usury was only wrong, when it was exacted in an oppressive manner from the poor.

At the present time there are few, we presume, who feel any hesitation about taking interest. States have become borrowers, and

vast national debts have grown up. Public opinion has undergone a great change; yet traces of the old feeling still linger. Banks are, in this Province, prohibited from charging more than seven per cent., and an effort was made during the last session of Parliament to re-impose the usury laws. There appear to be some who can not, or will not understand, that government interference has only a mischievous effect; that for the loan of capital a remuneration must be paid, depending on the amount of capital offered and demanded in the way of loan; and that, apart from this, the rate for each particular loan must vary according to the reputed solvency of the borrower, and the security offered for the safe and punctual return of the principal as well as interest.

Since the above was written, we have had a remarkable example, in the late financial panic in England, of the fluctuation in the rate of remuneration demanded and readily paid for loans, and of the salutary effect of leaving banks unfettered in this respect. On the 14th May, the Bank of England raised the rate for discount to ten per cent., and for advances on stock to twelve per cent.

JUDICIAL LABOUR.

It is obvious to any one at all acquainted with the working of our Courts, that there is a great disparity between the amount of business allotted to the respective judges. The heaviest labour probably falls upon the Judges of the Superior Court at Montreal. Of these there are four (Smith, Badgley, Berthelot and Monk, JJ.) residing in the city, who have to despatch the large and annually increasing business of the Superior Court; the heavy additional labour of the new Court of Revision; to undergo the arduous toil of the Circuit Court; to attend *enquêtes*; to sit in three divisions of the Superior Court; to preside over Jury trials; to hear numerous applications in Chambers, for writs of *Habeas Corpus*, *Mandamus*, &c.; to go out to the country and hold terms of the Circuit and Criminal Courts in the outlying districts; to supply vacancies in the Appeal side of the Court of Queen's Bench at Montreal and Quebec, &c.

On the other hand, the Court of Appeals, composed of five Judges, holds annually four terms at Quebec and four at Montreal, besides two Criminal Terms at each of these places. The applications in Chambers are comparatively few in number, and the evidence and summary of arguments in the cases brought before them are printed, so that the labour of perusal is lightened. Thus a large part of the year is unoccupied, save with "deliberation."

These facts are suggestive. We do not, however, contend that the labours of these last mentioned judges should be increased. It may be very fitting and proper that there shall be judicial posts in which dignified ease may be enjoyed. Opinions, too, pronounced after three or six months' deliberation, may reasonably be expected (though the expectation is not always realized) to establish fixed principles of jurisprudence.

With more appearance of reason may it be urged, though we are not quite prepared to say that such is the fact, that the multiplicity of business devolving upon the Judges of the Superior Court, must often prevent the deliberation requisite for the proper despatch of judicial duties. Decisions, it may be said, though rendered after a long *délibéré*, will frequently be based upon the first hasty impression formed at the argument, without a careful examination of the record. We were recently shown a deposition which by some carelessness had been tied up at both ends, so that it could not be read without being unfastened at one corner. The cause was a contested one, and at the time we saw it, judgment had just been rendered, showing, apparently, that the entire deposition had escaped the notice of the judge.

The inordinate length to which depositions frequently run, under our *enquête* system, adds immensely to the labour of the Judges. It was stated a short time ago by Mr. Justice Badgley, that a deposition extending over seventy-five sheets, which he had been obliged to peruse, for the purpose of deciding whether a particular question might be asked, could easily, without the slightest detriment to the value of the deposition, have been brought within the compass of ten or twelve pages,

and that he would not have permitted it to extend beyond that, could he have controlled the notes of evidence. A fact like this, which by no means stands alone, adds additional weight to the remarks of Q. C., (a writer well qualified to speak with authority on the subject,) on our *enquête* system, in the January number of the JOURNAL.

COURT OF APPEALS.—MARCH TERM.

The number of appeals decided during this term was seventeen, judgment being confirmed in seven cases, and reversed in ten cases. It may not be uninteresting to see how the bench was divided on these cases. We find that in *seven* cases there was an expressed dissent from the judgment of the majority; in *five* cases there being one dissenting judge, and in two cases two dissenting judges. This is exclusive of the case of the Queen and Ellice, in which judgment was reversed as to interest, awarded in favour of Ellice. In this case there were also two dissenting judges,—one dissenting *in toto*, and the other being disposed to modify the award.

Next, as to unanimous judgments. We find that the Court was unanimous in nine cases, chiefly of an unimportant character. In four of these cases the judgment of the Court below was confirmed, but in the other *five* the judgment of the Court below was unanimously reversed.

THE CHIEF JUSTICESHIP OF THE SUPERIOR COURT.

This responsible office has to be filled up by the Crown, and we trust that due care and deliberation will be had in the selection of the occupant. High judicial posts, to which arduous duties are attached, should not be filled up as a mere political reward or piece of preferment to the nominee. Judicial ability and capacity for work, united with *high* and *honorable* character, are the important considerations. We do earnestly hope that an end has been made of those improper appointments, which have brought disgrace on the Bench and have been a grievous injury to the profession.

Since the above was in type, we have learned that the Chief Justiceship has been offered to and accepted by the Hon. Mr. Justice MEREDITH. This is an excellent appointment and highly satisfactory to the profession as well as to the public generally. We understand that Judge MEREDITH will reside at Montreal.

We have also been informed that Mr. Justice BADGLEY will be appointed a Judge of the Court of Queen's Bench, to fill up the vacancy occasioned by the withdrawal of Judge MEREDITH. This, we believe, would also be a good appointment, if carried out.

THE HABEAS CORPUS ACT.

The following is the Bill for the suspension of the writ of Habeas Corpus:—

An Act to authorize the apprehension and detention until the eighth day of June, one thousand eight hundred and sixty-seven, of such persons as shall be suspected of committing acts of hostility or conspiring against Her Majesty's Person and Government.—
[Assented to 8th June, 1866.]

Whereas certain evil disposed persons being subjects or citizens of Foreign countries at peace with Her Majesty, have lawlessly invaded this Province, with hostile intent, and whereas other similar lawless invasions of and hostile incursions into the Province are threatened; Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. All and every person and persons who is, are or shall be within Prison in this Province at, upon, or after the day of the passing of this Act, by warrant of commitment signed by any two Justices of the Peace, or under capture or arrest made with or without Warrant, by any of the officers, non-commissioned officers or men of Her Majesty's Regular, Militia or Volunteer Militia Forces, or by any of the officers, warrant officers or men of Her Majesty's Navy, and charged—

With being or continuing in arms against Her Majesty within this Province;

Or with any act of hostility therein;

Or with having entered this Province with design or intent to levy war against Her Majesty, or to commit any felony therein;

Or with levying war against Her Majesty in company with any of the subjects or citizens of any Foreign State or country then at peace with Her Majesty;

Or with entering this Province in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any act of felony therein;

Or with joining himself to any person or persons whatsoever, with the design or intent to aid and assist him or them whether subjects or aliens, who have entered or may enter this Province with design or intent to levy war on Her Majesty, or to commit any felony within the same:

Or charged with High Treason or treasonable practices, or suspicion of High Treason, or treasonable practices;

May be detained in safe custody without bail or mainprize until the eighth day of June, one thousand eight hundred and sixty-seven; and no Judge or Justice of the Peace shall bail or try any such person or persons so committed, captured or arrested without order from Her Majesty's Executive Council, until the eighth day of June, one thousand eight hundred and sixty-seven, any Law or Statute to the contrary notwithstanding; provided, that if within fourteen days after the date of any warrant of commitment, the same or a copy thereof certified by the party in whose custody such person is detained, be not countersigned by a clerk of the Executive Council, then any person or persons detained in custody under any such warrant of commitment for any of the causes aforesaid by virtue of this Act, may apply to be and may be admitted to Bail.

2. In cases where any person or persons have been before the passing of this Act or shall be during the time this Act shall continue in force, arrested, committed or detained, in custody by force of a warrant of commitment of any two Justices of the Peace for any of the causes in the preceding section mentioned, it shall and may be lawful for any person or persons to whom such warrant or warrants have been or shall be directed, to detain such person or persons so arrested or committed, in his or their custody, in any place whatever within this Province, and such person or persons to whom such warrant or warrants have

been or shall be directed, shall be deemed and taken to be to all intents and purposes lawfully authorized to detain in safe custody, and to be the lawful Gaolers and keepers of such persons so arrested, committed or detained; and such place or places, where such person or persons so arrested, committed or detained, are or shall be detained in custody, shall be deemed and taken to all intents and purposes to be lawful prisons and gaols for the detention and safe custody of such person and persons respectively; and it shall and may be lawful to and for Her Majesty's Executive Council, by warrant signed by a clerk of the said Executive Council, to change the person or persons by whom and the place in which such person or persons so arrested, committed or detained, shall be detained in safe custody.

An Act to protect the inhabitants of Lower Canada against lawless aggressions from subjects of Foreign Countries at peace with Her Majesty.—[Assented to 8th June, 1866.]

For the protection of the inhabitants of Lower Canada against lawless aggressions from subjects of Foreign Countries at Peace with Her Majesty; Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. In case any person, being a citizen or subject of any Foreign State or Country at peace with Her Majesty, be or continues in arms against Her Majesty, within Lower Canada, or commits any act of hostility therein, or enters Lower Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would, by the laws of Lower Canada be liable to suffer death, then the Governor may order the assembling of a Militia General Court Martial for the trial of such person agreeably to the Militia Laws; and upon being found guilty by such Court Martial of offending against this Act, such person shall be sentenced by such Court Martial to suffer death, or such other punishment as shall be awarded by the Court.

2. If any subject of Her Majesty, within Lower Canada, levies war against Her Majesty,

in company with any of the subjects or citizens of any Foreign State or Country then at peace with Her Majesty, or enters Lower Canada in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or if, with the design or intent to aid and assist, he joins himself to any person or persons whatsoever, whether subjects or aliens, who have entered Lower Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same; then such subject of Her Majesty may be tried and punished by a Militia Court Martial, in like manner as any citizen or subject of a Foreign State or country at peace with Her Majesty, is liable under this act to be tried and punished.

3. Every citizen or subject of any foreign state or country who offends against the provisions of this Act, is guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried before "The Court of Queen's Bench" in the exercise of its criminal jurisdiction in and for any district in Lower Canada, in the same manner as if the offence had been committed in such District, and upon conviction shall suffer death as a felon.

THE ENGLISH LAW COURTS.

From the (United States) Law Reporter for November, 1844.

[The following, kindly furnished from the scrap-book of a Senior Queen's Counsel, may be read with advantage in Canada.]

Fertile as London is in places and persons of interest to an intelligent foreigner, there are, perhaps, no places more interesting to an American lawyer than the English courts, and no persons whom he more desires to see than the high functionaries engaged in the administration of the English law.

Perhaps the most striking and noticeable characteristic of the proceedings of the English courts, is the rapid and yet not hurried manner in which the business is despatched. There is no confusion, no bustle; but there is no pause. When a cause is called on for trial, it must be at once tried or disposed of in some way. You rarely, if ever, see the counsel for

one party rise at such a moment, with a pocket full of affidavits, and proceed to read them very much at his leisure, consuming the time of the court, and keeping the business waiting. "Are you ready for the plaintiff, brother Sharp?" asks the judge. "Yes, my lord," replies the barrister. "Is the counsel for the defendant ready?" No one answers. "Let a default be entered. Brown v. Smith stands next." And Brown v. Smith is on trial in a moment. The first witness takes the stand. The leader for the plaintiff rises at the same moment, and proceeds to interrogate him briskly and pointedly, and never sits till he is done with him. Meanwhile the junior is taking minutes, and there is no waiting for mending of pens, folding of papers, opening and shutting of tobacco boxes, chatting with clients or the miscellaneous hangers-on of a court room, or laboriously reducing to writing every syllable uttered by the witness. As soon as the plaintiff's counsel has finished his interrogatories, the defendant's counsel is on his feet, and at work with great vigour; and the instant he concludes, the sharp cry of the usher, "Step down, Sir," is uttered, and the witness vanishes in a second, and another takes his place.

The arguments of counsel, whether addressed to the court on questions of law or to a jury, are remarkable for brevity and point. There is no wandering from the questions at issue, no waste of labour upon irrelevant or inconsequential points, no personalities, no bombast, no high-flown flourishes of rhetoric, no long-winded and pointless stories, no wearisome iteration and re-iteration of the commonplace axioms of the legal profession.—Nothing can exceed the summary manner in which motions and questions of law are disposed of. It is the "ne plus ultra" of despatch, consistent with thoroughness and accuracy. In citing authorities, a barrister would as soon think of reading the litany as reading an entire case. The book, page and title of the action is given, and the sentence relied upon read, in general without more, the court being supposed to recollect the facts, and to be familiar with the reasonings. Of course, at times you hear the facts stated, but always succinctly and very briefly. The art of condensing into a nut-

shell a statement of facts which an American lawyer would feel justified in spending half an hour in narrating, seems to be perfectly understood and almost universally practised. The court are fully awake, and the barristers speak as if the motto were ever in their minds, "Millions are behind us." If you would be impressed with the value of half hours and minutes, spend a day in Westminster Hall.

As a specimen of the manner of conducting criminal trials, take the following:—

CENTRAL CRIMINAL COURT. OLD BAILEY.

Before the Recorder (Law) and Mr. Alderman Gibbs.

Charles Edwards, clerk, aged twenty-six, and William Johnson, sweep, aged twenty-one, were indicted for stealing one piece of cloth, value seventeen pounds, the property of Samuel Summers, in his dwelling-house. Johnson pleaded guilty, Edwards not guilty. The prosecutor swore to the cloth. One witness testified that he had seen the prisoner, Edwards, in the neighbourhood of the prosecutor's shop. A cabman testified that Edwards bespoke a cab of him; that while he was arranging the harness, Johnson, the other prisoner, came up with the cloth and got into the cab with Edwards; that immediately the hue and cry was raised, and both of them were arrested. This was all the testimony.

In defence of himself, Edwards (who seemed to be a Frenchman) remarked in broken English, that he knew nothing of Johnson, or of the cloth, and that he was very much surprised to find a man jumping into a cab which he had hired, and still more so to find himself held responsible for that man's crime. Johnson confirmed Edwards's statement in every particular.

Recorder.—"Gentlemen of the jury—It is for you to say whether you believe the prisoner's story or not, and to return your verdict accordingly."

The jury, without leaving their seats, found the prisoner "guilty."

Recorder.—"What have you to say in arrest of judgment or mitigation of sentence?"

Johnson.—"I should like to have time to send for my employer, who will give me a good character."

Edwards.—“ Me am un etranger, and does know not de laws English—never have see Johnson before dis time, and knows nothing about de cloth,” &c. &c.

Recorder.—“ I am satisfied that you are confederates. The theft was a very artful one, and it is necessary that property should be protected from artful rogues. You are each sentenced to transportation for ten years.”

The trial occupied about half an hour. *Quere*—If Johnson had got into an omnibus, would every passenger in it have been liable to an indictment for larceny?

John Higgins, chandler, aged twenty-five years, was indicted for stealing one mare, valued at twenty pounds, the property of George Rough. The prosecutor swore to his property, and two or three witnesses testified to attempts by the prisoner to sell the animal, and to contradictory accounts given by him of the way he got possession of her. The charge to the jury was substantially a repetition of the foregoing, and their verdict was the same.

Recorder, (after asking the usual question.) “ John Higgins, you might formerly have been capitally sentenced. The offence was evidently premeditated. Property of this kind must be protected. You are therefore sentenced to transportation for ten years.”

This trial occupied about twenty minutes.

These cases are cited, not as exemplifications of a wise administration of justice, but simply as random, and therefore impartial illustrations of the air with which business is transacted. It is very possible that each of the foregoing trials would have resulted in a verdict of guilty had they occurred in Boston or New York, but in either city, it is probable that time would have intervened between the verdict and sentence sufficient to enable the parties to show cause, if they could, why their sentence should be mitigated. But the trials themselves would perhaps have taken half a day each, and had fluent counsel been engaged, might have lasted half a week. We are a people of many words, and love sincerely to hear the sound of our own voices, and to enjoy the surprise of discovering with what ease we can string sentences together, and the reputation of having spoken for six hours or ten hours

at one time and upon a single provocation. In England, however, whether at the bar or in the legislature, it is quite the reverse. The rule seems to be to use as few words as possible, and every one of them to the point.

In respect to elocution and all that comes within the phrase, “ manner of speaking,” the English bar can claim no superiority over our own, if indeed it be not decidedly inferior. An American is surprised to hear so few persons speak what he calls good English. The counsel for the plaintiff addresses the jury with an Irish brogue so thick and rich that you can scarce understand what he is saying; while his antagonist replies in accents which so clearly indicate the “ land o’ cakes,” that you can almost see its lakes and mountains. The different local dialects of England are not unrepresented, but Yorkshire responds to Devonshire, and Cornwall to Northumberland, and London to all of them, in the course of a single sitting. The gestures, too, are for the most part inelegant and awkward, the language less fluent and ready, the general air more laborious than we are accustomed to observe in our own advocates of the same relative eminence. It would seem, indeed, that very little attention had been given to the cultivation of a good style of speaking, and the utmost unconsciousness on the subject appears to prevail. So long as what he says bears upon the point, and takes the ear of the court or jury, as the case may be, the advocate seems to deem it of comparatively trifling importance how he says it. On he goes, cutting and slashing away at the Queen’s English, nominative cases seeking in vain for agreeing verbs, parenthesis within parenthesis, broken sentences remorselessly left to gather up their *disiecta membra* as they can, but all the while never forgets a fact or point that makes for his own case, or which can be turned to advantage against his adversary. The argument is never lost sight of. With many of our speakers, on the contrary, it would be difficult to collect the fragmentary morsels of argument which float upon the rushing tide of their mellifluous eloquence, and we often feel inclined to repeat, in reference to their efforts, the criticism of the clown, who had read through the dictionary,—“ the words are

very good, but I don't quite understand the story."

Nor are the bar alone entitled to the credit of brevity and conciseness. The same characteristics distinguish the bench, and in an equally high degree. When the court takes time to consider, the case is indisputably one of some intricacy. Motions involving the rights and franchises of cities, boroughs and gigantic corporations, affecting immense sums of money, determining questions of the deepest public and private interest, and hinging often upon very nice points of technical law, are settled instantly upon the termination of the arguments, and judgment pronounced extemporaneously, and in the fewest possible sentences. No time is taken to draw up diffuse disquisitions upon every single point of law, which may have been mooted in the course of a hearing. Nor is it deemed necessary that the judge, on every occasion, should exercise his learning and attainments by fortifying each successive point, doubtful or not, with a long array of authorities. But he seems to feel that his time belongs to the public, and that he has no right to employ it but in their service. Business presses and must be done,—not talked about, but performed, finished. Great interests always stand waiting; great in the amount of property involved, the number of persons affected, and the legal principles at issue. Expedition, therefore, which is generally a convenience, a virtue, is there a necessity. Yet is this expedition attained not by whipping and spurring, not by sharp and brilliant anticipations of what witnesses or counsel could say, not by arbitrarily cutting cases short and summarily silencing remark. The necessities of society, if nothing better, have taught all concerned in the administration of the law their true places and functions, and they seem to conspire harmoniously in effecting the grand results for which laws are made and courts of justice established. The "patience and gravity of hearing" which Bacon commends, his successors well illustrate. The natural consequence is, that they are addressed by the bar with uniform courtesy and respect, and listened to with marked deference. Business is thus done pleasantly as well as expeditiously; and

good temper and good manners may be learned not less than good law. Of course, these remarks are to be understood *generally*. Particular exceptions doubtless exist, but they do not deserve to be noted, as they do not mar the total impression upon the mind of a stranger.

On the whole, no lawyer can visit the courts of Westminster Hall, and watch the course of business day after day, without being as forcibly impressed with the learning, labour and ability of the men who fill the high judicial stations of England, as with the magnitude and intrinsic importance of the causes which come before them for decision. Nor can he well depart without feeling that a wise and able administration of the law is one of the chief glories of an enlightened state, and that no expenditure can be deemed excessive which may be necessary to secure the highest character and ability for the performance of the arduous duties of the judge. The English judges have "permanent and honourable salaries," and therefore they are what they are. To the citizen of Massachusetts, the reflection can hardly fail to occur that, in his own state, the amount of judicial compensation is carefully calculated and grudgingly doled out, and the retrenchment of a few hundred dollars in this item of public expenditure, is thought to constitute a valid title to public gratitude on the part of its perpetrators. It is, however, somewhat consolatory to know that badly as our judges may be treated, and poorly as they may be paid, the judicial office has thus far fallen upon men of sufficient weight of character to resist these sinister influences, and that nowhere, perhaps, is justice more ably, wisely, uncorruptly and mercifully administered than in the Commonwealth of Massachusetts.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE—JUDGMENTS.

MONTREAL, 2nd March, 1866.

LEGAULT, Appellant, and LEGAULT, Respondent.

Held, That an appeal cannot be brought in *forma pauperis* to the Court of Queen's Bench.

This was a motion for the revision of an order in Chambers, allowing an appeal to be

brought in *forma pauperis*, from a judgment of the Superior Court.

AYLWIN, J., said that during an experience of forty years he had never heard of an appeal to that Court in *forma pauperis*. Appeals would be multiplied, and the greatest inconveniences would result from such a practice.

MONDELET, J., dissenting, was of opinion that the door of the Court should not be closed to the poor, who could not bear the expenses attending an appeal in the regular way.

Order rejected. Mondelet, J., dissenting.

GROULX, Appellant, and THE CORPORATION OF PARISH OF ST. LAURENT, Respondents.

Held, That there is no appeal from a judgment rendered under the Municipal Act of 1860.

This was an appeal from a judgment of the Circuit Court, Montreal, rendered 25th April, 1865, condemning the defendant to pay \$120, for neglect of duties as inspector of roads and bridges.

The Court was of opinion that the judgment complained of, being rendered by the Circuit Court, under the dispositions of the Municipal Act of Lower Canada of 1860, which takes away from the Court of Appeals all jurisdiction over judgments pronounced by the Circuit Court under that Act, there was no appeal.

Appeal dismissed.

Moreau, Outimet and Chapeleau for Appellant; *D. Girouard* for Respondents.

MONTREAL, March 6th, 1866.

PRESENT—DUVAL, C. J., AYLWIN, MEREDITH, MONDELET, and JOHNSON *ad hoc*, JJ.

Right Hon. EDWARD ELLICE, (appellant in the Court below,) appellant; and HER MAJESTY THE QUEEN, (respondent in the Court below,) respondent: and E. Contra.

Damages—Provincial Arbitrators.

Action to recover damages caused by the erection of certain Public Works.

This case originally came before the Provincial Arbitrators, on a claim by the Seigneur of Beauharnois, for damages caused to his property in the Seignior of Beauharnois, and in the adjacent township of Godmanchester, by certain dams erected by the Commission-

ers of Public Works at the head of the Beauharnois canal. On the 4th June, 1869, the arbitrators rendered an award allowing nothing to claimant, and an appeal was made under the statute, 22 Vic., c. 3, sec. 60, to the Superior Court, Montreal, which Court rendered a judgment for £8,575 in favour of the claimant. From this judgment the claimant appealed, and an appeal was also taken on behalf of Her Majesty.

The judgment of the Superior Court, which was rendered by Mr. Justice Badgley, has now been confirmed by the Court of Appeals, except that the latter court has gone farther, and granted the claimant interest on the £8,575 from the date of the judgment appealed from. The details of the case are very voluminous, but the following *résumé* will serve to show the main points in dispute.

Upon the completion of the Beauharnois Canal by the Provincial government, in 1849, the Commissioners of Public Works, under whose charge that work had been carried on, were compelled to raise the head of the water at its upper entrance in order to render the Canal efficient for public use; and, for the attainment of this object, caused two permanent dams to be erected, one connecting the upper point of Grande Isle with Clark's Island lying above it, both Islands at no great distance from the mouth of the canal, thereby forming, as it were, one continuous dam of considerable length; and the other lower down descending the river, connecting Grande Isle with the Seignior—*the south shore of the St. Lawrence*. The result was perceptible as the dams rose above the ordinary river level, and the object desired was fully accomplished by their construction. By means of these works, the entire channel of the St. Lawrence from shore to shore was narrowed two-sevenths of its extent, and in addition, the southern branch, which had before flowed between Grande Isle and the southern bank of the river (the north shore of the seignior) was entirely shut off. The head of water thus obtained did considerable damage to individuals by submerging all the lands that could be reached by the increased high water level. The dams were commenced in the spring of 1849, when the water was very low, and were completed in the autumn

of the following year, 1850, by which time numerous complaints and claims for damages were transmitted to the government by the owners of the submerged lands, chiefly in the Seignior and the adjacent townships. Amongst the number were the Seigniors of Beauharnois, as such Seigniors and proprietors of the adjoining township of Godmanchester. This claim, made up by Mr. Brown, the seigniorial agent, was transmitted to the Commissioners of Public Works in September, 1850, and was filed in their office. It was accompanied by a request for a voluntary agreement to be entered into between the Seigniors and the Commissioners for its amicable adjustment, or if that were not allowed, for the submission of the claim as required by law to the decision of the Provincial Arbitrators appointed for such purpose under the Public Works Act. The required reference was postponed by the Commissioners from time to time, and finally was only submitted by them to the arbitrators in 1858. In the interval, however, the pressure upon the Government for compensation for the submerged lands by the numerous parties interested, became so great that the Government appointed special commissioners to examine into the ground of the claims, and to effect their final settlement, which was accomplished to a considerable extent by payment of the various sums established by the official Commissioners as compensation for the losses caused by the submersions. In 1855, the Commissioners of Public Works undertook the construction of a dyke or embankment upon the lands of the claimant, intended to be a protection to the lands liable to be submerged. This work was undertaken without the consent of claimant; and after a prolonged correspondence, the Commissioners notified the Seignior's agent that no decision would be given on his claim for damages till the completion of the dyke. Finally, in November, 1858, eight years after the filing of the claim, and three years after the construction of the dyke, the case was submitted by the Commissioners to the Provincial Arbitrators. The claim made consisted of seven items; 1st, 7,400 arpents submerged in Catherinestown, Seignior of Beauharnois, at 30s. per arpent, £11,100. 2nd, 1,500 arpents submerged

in township of Godmanchester, at 20s. per arpent, £1,500. 3rd, Land for village, 26 arpents, at £50, £1,300. 4th, Land taken for Public Works in Grande Isle, 14½ at £10, £145 17s 6d. 5th, Land deteriorated from desiccation, 1,383, at 10s. (deterioration in value), £691 10s. 0d. 6th, Diminution of power at saw mill, &c., £500. 7th, Estimated loss of *lods et ventes* £1,000; forming a total of £16,237 7s. 6d. By the award of the Provincial arbitrators, the whole claim was thrown out, it being considered that any loss which might have been suffered by the Seignior of Beauharnois was covered by the increased value of his property. From this award Ellice appealed, and the Superior Court confirmed the award as regards items 1, 2, 3, and 6, allowing the appellant the sum of £8,575 instead of £14,400 claimed for these items, and totally disallowing the claim for items 4, 5 and 7. Each party appealed from this judgment. The main points submitted on behalf of the Queen were: 1st, that neither the claimant nor his *acteurs* were proprietors of the Seignior at the time the damages were said to have been suffered, or at any time prior thereto. 2nd: That no damages were suffered either in the lands in Catherinestown, nor in those in Godmanchester, nor at St. Timothée Mill; but that on the contrary, the lands in Catherinestown were largely benefited by the construction of the dyke.

AYLWIN, J., dissenting, adverted at length to the form of the proceedings, and stated his opinion to be that the whole proceedings were an absolute nullity, for the following among other reasons: The Crown had been foreclosed from answering the petition of claimant in the Superior Court, and there could be no foreclosure against the Queen; the proceedings were not instituted in the name of Her Majesty's Attorney General. On the part of the Crown there was not one syllable in writing where so much was necessary to be stated. Upon the merits of the appeal, his honour also thought that judgment should be reversed. He was of opinion that the arbitrators should have been ordered to amend their report. There was nothing stated in the judgment as to a certain right of passage; and nothing to secure the property to the Crown in the event

of it again becoming available by desiccation.

MEREDITH, J., concurred with the majority of the Court on the law points raised on the part of the Crown. He differed only as to the value of part of the land submerged. He considered \$5 per arpent to be a reasonable indemnity for the land outside of the embankment, which could never be any use again; but for land inside the embankment he thought \$5 too much, and that \$3 was enough. He agreed with Mr. Justice Badgley in thinking the form of the report of the Provincial Arbitrators very objectionable; but it would not be just to expose the parties to the inconvenience which would be caused by now ordering the award to be amended.

MONDELET, J., had come to the conclusion that the judgment appealed from should be maintained. He was not disposed to take up objections that neither the appellant nor the respondent had laid before the Court, but regarded the case as one that should be adjusted upon a fair and equitable basis. Upon the whole he coincided with the Court below in the conclusions arrived at.

DUVAL, C. J., said, one of the objections was that the report was irregular; that the arbitrators had not entered into particulars and had not assigned a reason for each adjudication. It would be strange if this, which was a complaint in the mouth of Ellice, were made a ground for dismissing his appeal. Upon the very face of the report there was an error. It was said that any loss sustained by claimant was covered by the increased value of his property. But this was not sufficient to justify the depriving a man of his property; for the same reasoning would apply to the land taken for the Grand Trunk Railway between Quebec and Montreal. In expropriating, there were two questions; first, the value of the property, independent of advantage or disadvantage; and 2nd, the amount of damage, of which a bill of particulars should have been stated in the award. There was no difference of opinion between Mr. Justice Meredith and himself, except on a question of fact, as to the value of part of the property. The evidence on this point was very contradictory, and upon the whole, he saw no reason to disturb the estimates of Mr. Justice Badgley, who had given

his opinion on each item of the claim. On the question of claimant's title, his honour observed that the Government had acknowledged his title throughout the whole of the correspondence which had taken place. No other claimant of the property had appeared since 1850 up to the present day, and no objection had ever been made by Government till almost the last moment. With respect to the Queen being foreclosed, there was nothing required in answer to claimant's petition except to say that there was no error in the award. The judgments appealed from would be confirmed, but the claimant, Ellice, would also be awarded interest on the sum of £8,575 from the date of the judgment rendered by the Superior Court.

Costs on both appeals in favour of Ellice.

A. & W. Robertson, for claimant; *T. K. Ramsay*, represented the Attorney-General, L. C.

(Leave to appeal to England was obtained.)

Present—AYLWIN, MEREDITH, DRUMMOND and MONDELET, JJ.

MONTREAL, 8th March, 1866.

BLACK et al. (defendants in the Court below), Appellants; and *LEFEBVRE* (plaintiff in the Court below), Respondent.

Action of damages occasioned by a collision.—*Held*, that under the circumstances there was negligence on the part of the plaintiff, and he could not recover damages.

MEREDITH, J.—This was an action of damages by the proprietor of a barge, called the *Quebec*, against the defendants, as the owners of the steamboat *Whitby*. The pretension of the plaintiff is, that the persons in charge of the *Whitby* negligently and maliciously caused that vessel to strike against the plaintiff's barge. The defendants contend that the collision was occasioned by the gross negligence of those in charge of the barge; that they were lying across the channel so as to make a collision inevitable; and that the *Whitby* did everything in her power to avoid the collision. The accident occurred near the entrance of the Lachine canal, at a place where the canal is about 300 feet in width; but the pretension of the appellants is that the channel, for vessels of the draft of the *Whitby*, at the place in question, is narrow, (about 100 feet in

width,) and that it is never departed from by vessels of the class of the steamer in question. It is proved that the canal is not adapted to vessels drawing more than nine feet of water; that the *Whitby* had a cargo on board worth \$15,000, and was drawing nine feet of water, and, therefore, could not safely leave the deep channel, (whatever may have been its width); and it is admitted that the barge was lying right across the channel. The main question in the case is as to whether the *Whitby* could have stopped, so as to avoid a collision, or without danger have passed to the left, that is, to the rear of the wood barge; because, however much the persons in charge of the barge may have been in the wrong, if she was run down wilfully by the *Whitby*, the owners of that vessel are clearly liable. Before, however, coming to the consideration of these questions, it is proper to see how it was the barge came to be lying across the channel.

It appears that when the barge had got four or five arpents above the entrance of the canal the wind fell, and, then, that the barge drifted down with the current to the part of the channel where the collision occurred. So helpless were the people in the barge, that although they were right across the channel, and although they saw the *Whitby* a mile off, yet they could not get out of her way.

When asked to explain this, and to account for not having used oars or poles, Ferdinand Lalonde, one of the sailors on board the barge, says, "*Nous avions des rames mais pas des taulets (rowlocks) pour les mettre. C'est ce qui fait que nous nous sommes servis de perches, mais elles étaient trop courtes; nous ne pouvions atteindre le fond; c'est le courant qui nous a viré et mis de travers.*" F. A. Johnson proves that poles could, if of proper length, have been used with effect. And the captain of the barge says, "*Nous ne nous sommes pas servis des rames parceque nous n'avions pas de rowlocks. On était assez occupé par la voile qui nous aidait plus que les rames.*"

As they were lying motionless, I do not understand how the captain can think the sail was helping them. To me it seems that sails without wind, oars without rowlocks, and poles so short that they could not touch the bottom, were all equally useless; and

that, under these circumstances, the vessel should be found lying helpless across the channel, was not surprising. There was one other way by which this might have been avoided, namely, by throwing out the anchor when the barge was drifting down with the current; which necessarily would have brought the bow or head of the vessel to the current, and in this way she would certainly have blocked up a smaller portion of the channel than she did when lying across it.

The captain when asked why he did not throw out his anchor, answered:—" *Parcequ'on ne peut pas toujours rester à l'ancre; car du moment qu'on a vu le steamboat Whitby il était trop tard pour jeter l'ancre. On était à la place où il nous a frappé. Le steamboat était à un mille de distance quand on l'a vu.*"

But we know that the barge had drifted down four or five arpents, and it is plain that the current, if sufficient to carry the vessel down, would have been sufficient, if the anchor had been thrown out, to turn her bow to the current. And here it may be observed, that the persons in charge of the barge were very inexperienced. It was the first season for the captain as such, and he, when examined, was only 21 years of age; and the two *navigateurs*, as they term themselves, who were assisting him, were, when examined as witnesses, of the ages respectively of 19 and 16. The inexperience of the crew on board the barge may have been one of the causes which prevented them from taking any efficient means for her preservation; but, be this as it may, I think it beyond doubt, that the situation of the barge, at the time of the collision, was altogether inexcusable.

Still we have to enquire, could the steamer have stopped in time to avoid the collision, or could she, consistently with prudence, have passed to the rear of the barge, because if either of these courses was open to her, the owners must pay for the damages to the barge.

I have gone over the evidence with much care, and am satisfied, from the position in which the barge lay, with reference to the entrance of the canal, and the current there, that it was not possible to stop the steamer in time to avoid the collision.

The evidence as to the other point—the possibility of the steamer going to the rear of the barge—is conflicting; but even if we take as our guide the opinions of the masters of vessels and pilots, (and this is the most favourable view for the respondent,) I think the weight of evidence is decidedly in favour of the appellant. In addition to mere opinions the appellants have proved some facts, which appear to me of great importance, as showing that the steamer could not prudently have deviated from her course to avoid the collision. There was doubtless a wide expanse of water to the rear of the barge, but the question is, was it of sufficient depth for vessels such as the *Whitby* drawing nine feet of water? Thos. Johnson, who says he has been navigating the rivers and lakes for the last fifteen years, and who has the command of a propeller of about the same size as the *Whitby*, says:—“I struck the bottom with my vessel at the entrance of the canal, not far from the lighthouse, but a little below it, last fall, (he thinks in November,) by keeping a little to the left, with a draft of 8 ft. 9 in.” Now, according to the witnesses for the respondent, the steamer ought to have done that which caused Johnson's boat to strike; and yet he says he was fortunate in not having a hole knocked into the bottom of the boat.

Charles Crawley, who has been navigating the rivers and lakes for the last 21 years, and has had command of almost all kinds of vessels used in the navigation, says:—“I have struck there several times myself by keeping a little too much to the left; on one occasion, I remember, with the *Brantford*, drawing about 8½ ft. of water. On another occasion, with a smaller boat of the same draft of water, that is, the *Banshee* propeller. John Hanna says:—“The first trip I made, about 8 or 9 years ago, coming down loaded, drawing about 9 ft. 3 in., we struck very hard opposite the old depot.” The evidence of Thomas F. Dutton, an experienced steamboat master, is to the same effect, and appears to me to be well deserving of attention. He says:—“I do not believe that a downward vessel like the *Whitby*, could avoid such a barge, without damaging herself; that is, if she attempted to go to the left there, she would get into shoal

water, and get among boulders. I know that there are boulders there to the left and shoal water too. I once had a steamer, 45 feet in width over all, attached to the pier, some distance below the lighthouse, probably 300 feet. I know that I was obliged to detach my steamer and go on, to permit a loaded propeller to pass down, as there was no room for her outside of my boat, without getting into the shallow water and among boulders; and I consider it equally dangerous all the way up to the buoy. It is particularly dangerous for a propeller to attempt to turn to one side in descending, because when she takes a sheer her rudder loses all command over her. You cannot bring her head back immediately to the deep channel. She goes ahead, and in such a situation would run among the boulders and into shoal water. I have found propellers aground myself, and helped them to get off; but more than 300 feet below the lighthouse I have known the mailboat “*Banshee*,” when loaded, but not drawing more than seven feet of water, get aground exactly abreast of the lighthouse, and half way between it and the old Lachine depot.”

The evidence of these witnesses is confirmed by that of Mr. Alexander Bisset, who has been superintendent of the Lachine canal for the last 19 years: “The downward vessel has the right of way, and should keep to the right. It is the business of upward bound vessels, particularly when unladen, to avoid her, by also keeping to the right. The position of the vessel, marked barge on said plan, is one which it would be against all sound reason for an upward bound vessel to occupy, and if it were 95 feet long, it would be impossible for a downward heavily laden steamer to avoid her, without running great risk, by turning to the left out of her proper channel. This risk would seem to me to be very great; the chances are, that by so going to the left, such a steamer would come into contact with boulders and shoals, and be seriously injured. In case she were further down, it would still be dangerous, in fact equally dangerous, unless she was far enough down to enable the steamer to stop from reaching her—that is, if she kept a like position in the channel.”

Our attention was drawn to the case of

Maitland and Molson, (Stuart's Reports, p. 441,) and to the case of the *Cumberland*, (Stuart's Adm. Rep., p. 75); but I do not find that the judgments in those cases can aid us in the present instance, in which the questions to be adjudicated upon are purely questions of fact; and after giving to those questions the best consideration in my power, I think it certain that the respondent is very blameable for the situation in which his barge was at the time of the collision; and I think the preponderance of evidence is decidedly in favour of the pretension of the appellant, that it was not in the power of those in charge of the steamer to stop her in time to avoid the collision, and that they could not, consistently with prudence, have attempted to pass to the rear of the steamer, by deviating from the channel to the left. For these reasons I think the judgment must be reversed.

MONDELET, J., dissented from the judgment. Aylwin and Drummond, JJ., concurred.

Judgment reversed, Mondelet, J., dissenting.

Cross & Lunn, for Appellants; *Loranger & Loranger*, for Respondent.

CORPORATION OF THE PARISH OF ST. BARTHELEMY, (defendants in the Court below,) Appellants; and DESORCY, (plaintiff below), Respondent.

Question as to the nullity of a certain by-law of the Municipal Council.

This was an appeal from a judgment of the Superior Court for the district of Richelieu, rendered by Mr. Justice Badgley. The action was brought to rescind the sale of certain property belonging to the plaintiff, which had been sold by the Secretary-Treasurer of the Municipal Council of the County of Berthier, in payment of taxes due to the defendants. The plea was, that the sale had taken place in accordance with by-laws made in due form by the defendants. The plaintiff answered, that the by-law of 5th September, 1859, on which the defendants chiefly relied, was illegal on its face. By the judgment of the Court below, the plaintiff's action was maintained on the ground that the by-law of 5th September, 1859, ordering the opening of a certain road, and levying a special tax, was not accompanied by the formalities required by law. In particular, it was alleged that

there was no *procès-verbal* previously made, and that those interested in the road were not notified of the proceedings of the Council, as the law required. The defendants appealed from this judgment. The chief points to be determined on the appeal were, 1st, whether the by-law was null on its face; 2d, whether the plaintiff could invoke this nullity in his special answer.

DRUMMOND, J., pronounced the judgment of the Court of Appeals, which confirmed that of the Court below.

Judgment confirmed unanimously.

E. U. Piché, for Appellants; *Olivier & Armstrong*, for Respondent.

FOLEY *et al.* (defendants in the Court below), Appellants; and FORESTER *et al.* (plaintiffs in the Court below), Respondents.

Proof in an action *ex parte* on a promissory note.

The action in the Court below was brought against the defendants as makers and endorser of a promissory note.

No proof was adduced on behalf of the plaintiffs; the defendants were foreclosed from pleading, and judgment was rendered *ex parte* in the plaintiffs' favour. The question submitted on the appeal was whether in such a case the plaintiffs should not have made proof of the partnership alleged to exist between them, and also of the partnership alleged to have existed between the defendants. Every signature and writing to or upon a promissory note, is, in a default or *ex parte* case, presumed to be genuine; but it was submitted that extraneous facts, such as the quality of the paper, were not to be taken as proved or admitted in default or *ex parte* cases.

DUVAL, C. J., said there was no ground whatever for this appeal.

Aylwin, Drummond and Mondelet, JJ., concurred.

Judgment confirmed unanimously.

A. & W. Robertson, for Appellants; *Cross & Lunn*, for Respondents.

JONES *et al.* (defendants in the Court below,) Appellants; and GUYON *diti* LEMOINE, (plaintiff in the Court below,) Respondent.

Held, that the Court may discharge a *délibéré*, and order the case to be inscribed on the

rôle d'enquête, for the purpose of allowing the plaintiff to complete his answers to interrogatories *sur faits et articles*, where the interrogatories have not been answered properly at first.

This appeal arose from the following circumstances:—The action was brought under a transfer of an obligation. The plea was, want of consideration, except to the extent of £90. On the 21st June, 1864, the Court, on motion of the defendants, permitted them to examine the plaintiff on *faits et articles* on the 25th June. On that day the plaintiff stated that he was engaged with another suit between himself and one of the defendants, and fearing to absent himself too long from this other case, he contented himself with answering the first two interrogatories, and then to the other 36 interrogatories, the following answer was entered at his request:—"I have no other reply to make but that which I made to the preceding (second) question." Subsequently, the defendants moved that these interrogatories be taken as admitted, inasmuch as the plaintiff had not answered them as he was bound to do. On the 30th Sept., 1864, Mr. Justice Berthelot ordered that the case be discharged from *délibéré*, and inscribed on the *rôle d'enquête*, in order that the plaintiff might answer the interrogatories following the second. The case was then re-heard, and on the 31st Oct., 1864, Mr. Justice Berthelot rendered a final judgment in plaintiff's favour. The defendants had the judgment reviewed, and it was confirmed by Smith and Berthelot, JJ.; Monk, J., dissenting on the ground that the Judge had no power to discharge the case from *délibéré*, for the purpose of enabling the plaintiff to come up and complete his answers. The defendants then appealed.

MONDELET, J., dissenting, said he concurred with Mr. Justice Monk in thinking that the Judge, when he discharged the *délibéré*, had exercised a power which the Court did not possess. There was manifest error in the judgment of the Court below, and it should be reversed.

DUVAL, C. J., was of opinion that the decision of the Superior Court was correct, and in accordance with law, and must be confirmed.

Aylwin and Drummond, JJ., concurred.

Judgment confirmed, Mondelet, J., dissenting.

Moreau, Ouimet & Chapeleau, for Appellants; *Edmund Barnard*, for Respondent.

MONTREAL AND CHAMPLAIN RAILROAD Co. (defendants in the Court below,) Appellants; and PERRAS, (plaintiff in the Court below,) Respondent.

Railway Company held not liable for animals killed, the accident having occurred when the fences were down during the winter.

This was an appeal from a judgment of the Circuit Court, Montreal, condemning the defendants to pay the plaintiff the value of certain animals killed on the track. The action was brought by a farmer, of the parish of Laprairie, to recover the sum of \$120, viz., \$70, the value of a mare, and \$50, the value of a colt, killed on the railway track, on the 16th Dec., 1862. It was alleged by the plaintiff that the company were bound to keep the fences on each side of the line in good repair; but that owing to the fences being down, the animals above mentioned got on the track and were killed by the cars. The defendants pleaded that in December, when the accident happened, all the fences had been taken down, to prevent the accumulation of snow on the road; and consequently the plaintiff should not have allowed his animals to go at large. The fences were taken down in accordance with an old established custom. It was further stated that there was nothing to show that the animals were killed by the cars. Loranger, J., having rendered judgment in favour of the plaintiff, the defendants appealed.

DRUMMOND, J., dissenting, was of opinion that the judgment should be confirmed. The enclosures had been taken down, and the company were therefore liable for the accident.

MONDELET, J., rendering the judgment of the Court, said that the plaintiff himself was the cause of the accident, and the company could not be held accountable. The judgment must be reversed.

Duval, C. J., Aylwin and Meredith, JJ., concurred.

Judgment reversed, Drummond, J., dissenting.

Cartier, Pominville & Bétournay, for Appellants; *Médéric Lanctot*, for Respondent.

LALONDE, (plaintiff in the Court below,) Appellant; and BRUNET, (defendant in the Court below,) Respondent.

Question as to payment of *rente constitute* representing *lods et ventes*.

This was a hypothecary action to recover from the defendant, as *tiers-détenteur* of the half of certain property, the amount of a constituted rent with arrears, in all \$390. The defendant pleaded a peremptory exception, setting up that the rent in question was seigniorial, and represented the *lods et ventes* which had been commuted; that the commutation price had been paid, and the property cleared from all incumbrance. The defendant's pleas were maintained by the judgment of the Superior Court, rendered by Mr. Justice Berthelot, 27th June, 1862, and the plaintiff's action dismissed. It was from this judgment that the present appeal was brought.

MONDELET, J., dissenting, was of opinion that the judgment should be reversed.

AYLWIN, J., also dissented. It was to be observed that under the terms of the original contract, there was to be no sale whatever, unless it were with the permission of the present appellant. So far from this, there had been three different sales, and the result was to compel the present appellant to lose \$300, to which he was fairly entitled. His Honour was of opinion that the judgment should be reversed.

DUVAL, C. J., rendered the judgment of the Court, confirming that appealed from.

MEREDITH, J., concurring, said that before he saw the plaintiff's answers to the defendant's articulation of facts, he was of opinion that the judgment should be modified to the extent that the plaintiff should have security against *trouble*, because he thought it probable that the claim had never been paid, though the interest had been. But on looking at the answers, he saw that this was unnecessary, it being admitted the money had been paid.

Drummond, J., concurred.

Judgment confirmed, Aylwin and Mondelet, JJ., dissenting.

Morcan, Ousimet & Chapeleau for Appellant; *Rouer Roy, Q. C.* for Respondent.

WARDLE, (plaintiff in the Court below,) Appellant; and BETHUNE, *es qualite*, (defendant in the Court below,) Respondent.

Held, that the proceedings of *experts* are null and void, when notice thereof has not been given by them to both parties.

This appeal was from a judgment rendered by the Superior Court, 25th January, 1865, dismissing the plaintiff's action, declaring that the sum due to the plaintiff was more than compensated and extinguished by the damages set up in compensation, which were put down in the report of *experts* at \$30,282. The intention of the plaintiff was to carry the case to the Privy Council, but he submitted that the proceedings had by the *experts* must be declared invalid, no notice thereof having been given to the plaintiff or his agent.

DUVAL, C. J. It is impossible to confirm the judgment. The *experts* did not give the plaintiff any notice, and therefore their proceedings are null and void.

Meredith, Drummond and Mondelet, JJ., concurred.

Judgment reversed unanimously.

A. & W. Robertson, for Appellant; *S. Bethune, Q. C.*, for Respondent.

BISSETTE *et al.*, (defendants in the Court below,) Appellants; and BORNAIS, (plaintiff in the Court below,) Respondent.

Action for false imprisonment against the informant, bailiff making the arrest, and the two committing justices.

Held, that the two justices alone were liable in damages, which were reduced to £25.

This was an appeal from a judgment of the Superior Court, rendered by Mr. Justice Monk, on the 26th January, 1865. The action was brought by the plaintiff to recover the sum of \$1000 damages for false imprisonment, under the following circumstances. In June, 1860, Joseph Duquette, a schoolmaster of St. Valentin, laid an information before Anacleto Bissonette, a justice of the peace, alleging that the plaintiff had feloniously conspired against the life of himself, his wife, and children, by attempting to demolish the school-house in which they resided. On this complaint, the plaintiff was arrested and brought before Anacleto Bissonette and his brother Joseph, also a justice of the peace.

After hearing evidence, the two Bissonettes sent the plaintiff to the Montreal jail, under charge of Mongeau, a bailiff. The plaintiff was immediately liberated by the order of one of the judges of the Superior Court sitting at Montreal, who declared that the alleged offence was unknown to the law. The plaintiff then brought his action against the two justices of the peace, the schoolmaster, and the bailiff. The judgment from which the present appeal was brought, condemned the four defendants *solidairement* to pay the plaintiff the sum of £100 damages.

DUVAL, C. J., said, that the two justices of the peace had not justified their conduct. They gave an order which was illegal; but for the illegality of this order the schoolmaster and bailiff were not responsible. Moreover, the damages awarded were extravagant. The judgment would be reversed, and the action dismissed as to Duquette and Mongeau. The judgment against the two Bissonettes would be reduced to £25; Duquette and Mongeau would have the costs of both Courts in their favor, and the plaintiff must also pay the costs in appeal of the other defendants, because the demand was extravagant and should not have been persisted in.

Meredith, Drummond and Mondelet, JJ., concurred.

Judgment reversed, damages reduced to £25 against A. and J. Bissonette only.

Leblanc, Cassidy & Leblanc, for Appellants; Moreau, Oumet & Chapleau, for Respondent.

HARROIS, (plaintiff in the Court below,) Appellant; and St. JEAN, (defendant in the Court below,) Respondent.

Held, that an action *en séparation de biens* may be instituted in the district wherein the defendant is summoned by personal service, according to C. S. L. C. cap. 82, sec. 26.

This was an appeal from a judgment of the Superior Court in a default case, rendered on the 30th June, 1865, by Mr. Justice Berthelot. The plaintiff brought her action *en séparation de biens*, against her husband. Both parties were domiciled in the district of Richelieu, but the defendant was described as being temporarily in the district of Montreal, where the action was brought, the defendant being personally served in the city of Montreal. The

case was dismissed, on the ground that the plaintiff should have brought the action in the district where the parties had their domicile.

DUVAL, C. J., said that the judgment must be reversed. The defendant could be sued in any district where he was personally served.

Aylwin, Meredith, Drummond and Mondelet, JJ., concurred.

E. U. Piché for Appellant.

WATT, (plaintiff in the Court below,) Appellant; and GOULD *et al*, (defendants in the Court below,) and JACQUES *et al*, (intervening parties in the Court below,) Respondents.

Delivery of wheat.—Question as to carrier's right to store under the circumstances.

This was an appeal from a judgment of the Superior Court, rendered by Mr. Justice Smith on the 31st October, 1864. The action was brought to revendicate 9,941 bushels of wheat, seized in the possession of the defendants. The judgment recognized the defendants' right of lien for storage, and also the right of the intervening parties to the sum of \$1,680, for the carriage of the wheat from Cleveland, Ohio, to Montreal, and also their right to be paid the freight out of the proceeds of the wheat. It was on these two items of storage and freight that the plaintiff appealed. The wheat arrived at Montreal about one o'clock, on the 16th October, 1862, in the *Avon*. Jones & Co., the consignees, directed the *Avon* to go along side of the *Caledonia*. She went alongside early on the 18th, and found her discharging coals. The *Avon* soon after went away, on the ground that the *Caledonia* was not ready to receive the wheat, which was then stored. The whole case turned on this: was the *Caledonia* ready to receive the wheat, and were the intervening parties justified in storing when they did? The Court below having maintained the right of storage against the plaintiff, the present appeal was brought.

MEREDITH, J., said it was to be regretted that both parties had stood so determinedly upon their extreme rights. The amount involved was now several hundred pounds, whereas at first it was only about \$100. If the *Avon* had waited a short time, this loss

would have been avoided, but the plaintiff positively refused to pay for her detention. Prompt despatch in loading and discharging was of importance, and had been stipulated for in the contract. The evidence showed that the intervening parties were justified in storing the wheat, the *Caledonia* not being ready to receive her cargo on the 17th. As to the 75 bushels, alleged short delivery, he would have been disposed to modify the judgment to this extent, but all the judges were agreed in saying that the judgment must be confirmed.

Duval, C. J., Aylwin, Drummond and Mondelet, JJ., concurred.

Judgment confirmed unanimously.

Torrance & Morris, for Appellant; *A. Robertson, Q. C.*, for Respondents.

ROLLAND, (plaintiff in the Court below,) Appellant; and JODOIN, (defendant in the Court below,) Respondent.

Held, that the use of the words *paie tes dettes*, by a creditor to his debtor, on the public street, in the hearing of passers by, gives ground for an action of damages.

This action was brought to recover \$8,000, damages for verbal slander.

It appeared that as the plaintiff was walking along Notre Dame Street one evening, the defendant met him and called out to him, Rolland, Rolland. The latter did not stop nor answer. The defendant then exclaimed, according to the plaintiff's assertion, pay your debts, pay your debts, (*paie tes dettes, paie tes dettes.*) It was in consequence of this insult that the action was brought. The defendant denied having used these words. He alleged that he had merely called upon the plaintiff to come and settle his account. At this time the plaintiff was second endorser on two notes held by the defendant to the amount of \$3,000. The plaintiff had neglected to pay, wanted delay, and for the purpose of obtaining delay, had appealed from a judgment against him at the suit of the defendant. The debt, however, was afterwards settled in full. The action was dismissed by Smith, J., on the ground that the plaintiff had wholly failed to prove his case. From this judgment the plaintiff appealed.

DRUMMOND, J., dissenting, said it was absurd that a case of this nature should be brought in the Superior Court. The plaintiff might perhaps have been entitled to three or four dollars damages; but the injury was so trifling, that the judge of the Superior Court acted wisely in dismissing the action. Litigation for trifles like this should not be encouraged. He therefore fully approved of the judgment in the Court below.

MEREDITH, J., said it certainly was matter for regret that this action should have been brought in the Superior Court. There seemed to be nothing very offensive in the words used, yet he did not think it was justifiable for the defendant to tell the plaintiff in the public street to pay his debts. But an action for \$8,000, brought in the Superior Court, exposing the defendant to considerable trouble and expense, was quite unnecessary.

MONDELET, J., said that the plaintiff had made proof of his allegations. The expression, used in the open street, was injurious, and wounded the plaintiff's sensibilities. The judgment, therefore, would be reversed, and £20 damages awarded.

Duval, C. J., and Aylwin, J., concurred.

Judgment reversed, Drummond, J., dissenting.

C. & F. X. Archambault, for Appellant; *Lesage & Jetté*, for Respondent.

BEAUDRY, (defendant in the Court below,) Appellant; and ROY *et al.* (plaintiffs in the Court below,) Respondents.

Action for damages caused by privy being built against *mur mitoyen*.

The action in this case was brought by the plaintiffs, to recover £600 damages, caused by the defendant having built privies against the *mur mitoyen*, the parties being neighbours. The filth from these places had penetrated and flowed through the *mur mitoyen*, causing a disagreeable smell in the plaintiffs' premises. There was also a demand for £52, half the cost of repairs to the *mur mitoyen*. The judgment appealed from by the defendant was rendered in the Superior Court by Smith, J., 30th April, 1864, condemning the defendant to pay £50 as damages, and ordering him to thoroughly repair the *mur mitoyen*.

DUVAL, C. J. This is entirely a question of fact, and we think the judgment must be confirmed with costs.

Aylwin, Drummond and Mondelet, JJ., concurred.

Judgment confirmed unanimously.

C. & F. X. Archambault, for Appellant;
G. Joseph, for Respondent.

MONTREAL CITY PASSENGER RAILWAY CO.
(defendants in the Court below,) Appel-
lants; and BIGWON, (plaintiff in the Court
below,) Respondent.

Held, that an action for damages will not lie, where the injury is the result of pure accident, and where no negligence can be imputed to the defendants.

This was an appeal from a judgment of the Superior Court, rendered by Monk, J., on the 30th April, 1864, condemning the company to pay the sum of \$600 damages for the death of the plaintiff's son, killed by one of the cars in July, 1862. The action was brought for £500 damages, £200 for the expense of bringing up the child to the time of his death, and £300 for expenses of interment, and for the father's grief at the loss of his child. The accident occurred in St. Joseph Street. The car at the time was going west, at a moderate rate of speed, and had gone a short distance beyond Versailles Street, when the plaintiff's child suddenly ran from behind a cart on to the railway track, directly in front of the car, where he was instantly knocked down, and run over by the car, before the driver could stop it. The defendants contended in the Court below, that they were not liable in any sum whatever, chiefly because the lamentable occurrence was the result of pure accident, in so far as they were concerned; and also because it did not appear to them that, under the circumstances, the plaintiff had a right to demand any pecuniary remuneration for the death of his infant child. Damages could be given only in proportion to the injury resulting from the death to the parties for whom the action has been brought. The defendants, in appealing from the judgment against them, urged that the "injury," the amount of which is to be the measure of damages in an action for the benefit of the

survivors, must be a material injury, capable of estimation in money, upon some practical basis, either specific or general, and that damages could not be granted as a mere *solutum* for the feelings of the complainant.

AYLWIN, J. I am not disposed to reverse the judgment. I would hold the Company to the strictest responsibility. I therefore dissent from the judgment of the Court.

DUVAL, C. J. It is beyond a doubt that the driver was not in fault here. He had no opportunity of stopping in time, for he could not see a little boy that suddenly ran in front of the horses. The judgment is therefore reversed.

Mondelet and Drummond, JJ., concurred.

Judgment reversed, Aylwin, J., dissenting.

Abbott & Dorman, for Appellants; Leblanc, Cassidy & Leblanc, for Respondent.

PENNOYER, (plaintiff in the Court below,) Appellant; and BUTLER, (opponent in the Court below,) Respondent.

Title to property.—Right to file opposition.

Certain real property having been taken in execution, as belonging to Lothrop Chamberlain, defendant in the Court below, the respondent, by his opposition *afin de distraire*, claimed the land under a deed of sale to himself. This opposition was contested by the Appellant, on the ground that the land did not in reality belong to the opposant, but that he held it for the defendant, whose property it was. It appeared in evidence that the land either belonged to the defendant, or to the old firm of Baxter & Chamberlin, dissolved twenty years previously, of which defendant was a partner. Mr. Justice Short having maintained the opposition, the plaintiff appealed.

MURDITH, J., was of opinion that the opposition should have been dismissed. The opposant, being merely an agent, had no right to file an opposition in his own name.

Aylwin, Drummond and Mondelet, JJ., concurred.

Judgment reversed.

Sanborn & Brookes, for Appellant; Felton & Felton, for Respondent.

WALKER *et vir*, (plaintiffs in the Court below,) Appellants; and THE CORPORATION OF SOREL, (defendants in the Court below,) Respondents.

Held, that where essential matter is merely imperfectly stated, and not entirely omitted, the defendant should attack the declaration by an exception *à la forme*, and not by a *défense en droit*.

MEREDITH, J. The plaintiff in the Court below brought a petitory action against the respondents, and in her declaration she describes herself as "Dame Mary Walker de la ville de Sorel, dans le district de Richelieu, épouse contractuellement séparée de biens de John George Crébassa, Ecuier, notaire public du même lieu, et le dit John George Crébassa en autant que besoin est pour autoriser sa dite épouse."

The respondent filed a *défense au fonds en droit*, and contended that the allegations of the declaration, as to the separation as to property of the plaintiff from her husband, are insufficient. The judgment of the Court below maintained the *défense en droit*, one of the *considérents* of the judgment being: "Considérant que dans la dite déclaration les demandeurs n'ont allégué et fait voir aucun droit de la demanderesse d'ester en justice et d'instituer la présente action comme séparée de biens d'avec son dit mari, n'alléguant pas la dite séparation et comment elle s'est opérée."

The rule on this subject, as I have always understood it, is this: "That matter essential entirely omitted is the subject of a *défense en droit*, but that matter essential imperfectly stated is the subject of an *exception à la forme*." (3 Rev. de Leg. p. 196.) Applying this rule to the present case, if the respondent had any reason to complain, (a point which we are not called upon to decide,) there should have been filed, not a *défense en droit*, but an *exception à la forme*; and therefore the judgment, maintaining the *défense au fonds en droit*, ought to be reversed.

Aylwin, Drummond, and Mondelet, JJ., concurred.

Judgment reversed.

D. Girouard, for Appellants; Lafrenaye & Bruneau, for Respondents.

CRÉBASSA, (defendant in the Court below,) Appellant; and MASSUE, (plaintiff in the Court below,) Respondent.

Held, that a return made by the Sheriff of *rebellion à justice* is sufficient evidence to justify the Court in making a rule against the defendant, for *contrainte par corps*, absolute, where the defendant does not appear. C. S. L. C. cap. 83, sec. 143-145.

This appeal was from an interlocutory judgment rendered in the Superior Court, 20th May, 1864, on motion of the plaintiff for a rule *nisi* for a *contrainte par corps*, and also from a final judgment rendered by the same Court, 31st May, 1864, declaring the rule absolute, with costs against the defendant, for having committed a *rebellion à justice*, on the 28th April, 1864, as appeared by the return of the sheriff of the district of Richelieu, to the writ of *pluries pluries venditions exonas de bonis*, addressed, 31st March, 1864, to the sheriff of the district of Richelieu, wherein the defendant resided, and had opposed the sale of his goods and chattels previously seized. The judgment was appealed from on the ground of irregularity in the proceedings, and because judgment had been rendered without any proof. The respondent contended that the Ord. of 1667 had been superseded by the statutory enactments contained in C. S. L. C. cap. 83, sec. 143 to 145. The return of the sheriff in such a case as this was not traversable.

MEREDITH, J., said, it was not denied that the appellant opposed the execution. The defendant had made default, and the return of the sheriff must be considered sufficient evidence. The Court saw no reason to disturb the judgment rendered by the Superior Court.

AYLWIN, J., said, it would be impossible in this matter to proceed according to the Ord. of 1667. He was satisfied that what had been done time and again might be done in this case.

Duval, C. J., concurred.

Mondelet and Drummond, JJ., dissented.

Judgment confirmed.

D. Girouard, for Appellant; Lafrenaye & Armstrong, for Respondent.

MONTREAL, March 9th, 1866.

Ex parte JAMES MILTON BROWN.

Extradition—Warrant of Commitment.

Held, that a warrant of commitment, under the Extradition Treaty, which omits to state that the accused was brought before the magistrate, or that the witnesses against him were examined in his presence, is bad upon the face of it, and must be set aside.

In this case a writ of *habeas corpus* had been ordered to issue on the preceding day, returnable *immediate*. The case again came up on the return of the writ.

The grounds of the application are sufficiently apparent from the remarks of the judges, of which the following is a full report.

DUVAL, C. J., said, this case had been so fully argued for several days past that no further light could possibly be thrown upon it. The judges entertained no doubt whatever that the man should be discharged. It was therefore ordered, that it appearing upon the return to the writ, that the warrant of commitment in virtue of which Brown was now detained, was bad, he be discharged from custody, his detention being illegal. The case was certainly one of very great importance. In the first place it was of importance to the liberty of the subject. It was not an ordinary case of depriving a man of his liberty and leaving him in the country, but it was a case of sending him out of the country. It might be said that this man was not a British subject. Still, he was within British territory, and so long as he was in British territory, he owed allegiance to Her Majesty, and owing allegiance he was entitled to protection. If extradited, not only would he be deprived of his liberty, but he would be sent out of the Queen's dominions, and this no court had power to do unless in accordance with the law. It should be well understood that this court was prepared most fully and faithfully to execute the stipulations of the Treaty, and that the Judges would not encourage or suffer any quibbling with its terms. If the Judges saw that a party fairly came within the provisions of the Treaty, it would be in vain for him to attempt to escape by exceptions *à la forme*. The Court would not listen to such exceptions, but would see that justice was

done. It was intimated over and over again, that if there was a mere informality in this case, another warrant might be substituted by the magistrate. Nothing of the kind has been done. We must suppose, therefore, that the magistrate had a reason for not doing so. We have to determine as to the warrant before us, and we have no hesitation in saying that it is illegal. Not one of the requirements of the amended Act 24 Vic. cap. 6, has been complied with. The Statute says, first, that the party shall be charged upon oath, and the magistrate thereupon shall have him arrested and brought before him. I believe the majority of the Judges are agreed that if the man is already before the magistrate, it is not necessary to issue a new warrant, because the object of the warrant is the arrest. But if the man is before the magistrate, what is to be done? The magistrate may examine upon oath any persons touching the truth of the charge, and upon such evidence as according to the laws of this Province would justify the apprehension and committal for trial of the person so accused, if the crime had been committed here, it shall be lawful for such magistrate to issue his warrant for the commitment of the person, till surrendered or discharged. Here was a very important proviso, which must be fulfilled. Great Britain had not yielded to the demands of foreign powers. She said: it is not sufficient that this is a crime in your country; it must be a crime in this country. We see the object the Legislature had in view. It must appear upon the warrant of commitment that the accused had been brought before the magistrate, and that the magistrate examined witnesses in his presence in the terms of the said act. We see at once the importance of complying with this; for no one would pretend that a British subject, or even a stranger, could be sent out of the Queen's dominions without having heard what was alleged against him, or having an opportunity of giving any explanation. This was no idle form; it was essential that it should appear on the face of the warrant; and this Court, in the exercise of its controlling and superintending powers, must see whether it had been complied with.

Another question might arise—whether this

Court might not substitute another warrant. No precedent has been cited in support of such a right. In *Bissett's case*, the Court of Queen's Bench denied the right. On this, however, we pronounce no opinion. The magistrate was fully aware that he had a right to substitute another warrant, and not having done so, it would be wrong for this Court to take an initiatory proceeding in the matter. Therefore the Court, while it reserved any decision on its powers in this respect, would not interfere. Nor would it pronounce any opinion upon the power of a Judge in vacation to substitute his own warrant. The case of the *Chesapeake* fully confirmed the view taken by the Court in this case. But without reference to precedents, he believed a careful attention to the general principles of law would satisfy any one, though not a lawyer, that the rule laid down by the Court was reasonable, and regard for the liberty of the subject imperatively called upon the Court to enforce that rule. The Court, then, being clearly of opinion that the warrant of commitment was bad and insufficient to detain the prisoner, would order his discharge.

AYLWIN, J., entirely concurred in the opinion of the Chief Justice.

MEREDITH, J., said it was with regret he concurred in the judgment about to be rendered, but he was of opinion that the case did not admit of doubt. The magistrate acted under a special authority, and his commitment ought to show upon the face of it that at least in all matters of importance, he had followed the directions of the statute. In the present case it does not appear, upon the face of the commitment, that the prisoner heard the evidence against him, or even that he was before the magistrate. And were we to hold such a commitment valid, we would in effect say that a person may be surrendered under the Treaty without having had any opportunity of offering an explanation respecting the charge brought against him or knowing even by what evidence that charge was supported.

MONDELET, J., said it was to be regretted that the case should fail; but the responsibility was not upon the judges. They were anxious to carry out the Treaty to the fullest

extent; but it must be done according to law. A special power given by a special law must be exercised with much greater caution than powers conferred by the common law. He fully concurred in the remarks of the other judges.

Drummond, J., concurred.

Prisoner ordered to be discharged.

B. Deakin for Petitioner; *T. K. Ramsay* for the Crown.

RECENT ENGLISH DECISIONS.

[Collated from THE LAW REPORTS.]

Negligence—Railway—Level Crossing.—

There is no general duty on railway companies to place watchmen at public footways crossing the railway on a level; but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company.

A railway was crossed by a public footway on a level, and was protected by gates on each side of the line, and caution boards were placed near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line; but on the level of the line it could be seen for 300 yards each way. A woman approaching the line by that gate was detained by a luggage train on her side, and immediately on its having passed, crossed the line, and was run down and killed by a train coming along the other line of rails. There was no evidence of negligence in the mode of running the trains:—*Held*, that there was no evidence of negligence on the part of the company, but that there was evidence of negligence on the part of the deceased. *Stubley v. The London and North Western Railway Co.* Ex. p. 13. Baron Bramwell observed: "In crossing the rails at all, this woman was, as people often do, heedlessly going on at the rear of a passing vehicle on her side, without waiting to see whether the other line was clear."—[*To be Continued.*]

PRIVATE EXECUTIONS.—The measure for substituting private for public executions in England has been approved of by a majority of the House of Lords, and probably will soon become law.

The Lower Canada Law Journal.

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THE CODE OF CIVIL PROCEDURE.

In some respects, it must be conceded that we are not a backward people in this country, and the interest manifested in the revision and consolidation of our laws is one of them. We have had our Statutes revised, and we have had them consolidated, and now, while the subject of codification is still only on the *tapis* in England, we in Lower Canada possess two codes—the Civil Code, and the Code of Civil Procedure. That which England, with her illustrious jurists and eminent text-writers, has never accomplished, and still doubts the possibility of accomplishing, her enterprising colony has brought to pass. The Civil Code will soon be law from Gaspé to Ottawa, and the Code of Civil Procedure is, while we write, rapidly passing through Committee of the House.

The advantage of having a Code, even an indifferent Code, cannot be disputed, and although many will probably be of opinion that our Code, considering the time and money that have been expended on it, is not so immaculate as could be desired, yet its simple existence, as a cleared spot in the midst of a tangled thicket, must be a source of relief and satisfaction.

It is not our intention, however, at present, to enter into any discussion respecting Codes, but rather to refer to the action taken by the Montreal bar, with respect to the Code of Civil Procedure, which must naturally attract the special attention of practitioners.

At one of the meetings held in June, to consider the proposed changes to the Act respecting the Bar, it was suggested by Mr. RITCHIE, that it was time, then or never, to pay some attention to the Code of Procedure, a matter of much greater importance than that which was then being considered. Parliament was in Session, and the draft of the Code was rapidly passing through committee. He suggested, therefore, that a committee should be immediately named to take the draft of the

proposed code into consideration, and see what amendments were desirable. The Committee named was composed of Messrs. RITCHIE, ROBERTSON, Q.C., DOUTRE, Q.C., JETTE, and BETHUNE, Q.C., and although the time was short, and the weather none of the coolest, these gentlemen prepared a report, with annexed schedules of amendments, which evinces close examination and acute reflection. Besides the points which we have been able to notice below, the committee suggested a large number of minor alterations and verbal changes, most of which at once command the approval of the reader. A meeting of the bar was called to consider the report on the 19th of July, but it being vacation, and the notice short, there was not a *quorum* present, and the suggestions were merely submitted in an informal manner, the proposed amendments for the most part being acquiesced in by those present. The members of the bar present at this meeting were Messrs. ROBERTSON, Q.C., batonnier, MACKAY, RITCHIE, TORRANCE, DOUTRE, Q.C., JETTE, ARCHAMBAULT, PAGNUELLO, KIRBY, and the Secretary, Mr. SNOWDON.

The Report was as follows:

"The Committee named to consider what amendments are required in the proposed Code of Civil Procedure, beg leave to report that they have gone through the articles contained in the Report of the Commissioners, and the amendments suggested by the Committee are embodied in the Schedules A and B hereunto annexed. The amendments proposed to articles 45, 254, 262, 351, 352, 355, 356 and 357, are only concurred in by a minority of the Committee.

The principal changes recommended by the Committee are the following:

Art. 32. That parties bringing actions of damages in *forma pauperis* shall be liable to *contrainte* for the costs awarded to the opposite party.

90. That in case of default of defendant in *saisie-arrest* after judgment, judgment may be rendered in vacation.

150. That in pleading, no replication be required.

210—222. That the articulation of facts be abolished.

311—312. That the number of Commissioners named to execute a *Commission Rogatoire* be reduced.

That the delays in term and vacation be uniform. That a uniform delay of *eight* days be substituted for the delays of five, six, ten, fifteen days, mentioned in articles 551, 649, 652, 720, 760, 932, 1063, 1070, 1112, 1120, 1139, and 1142.

538. That a legal tender may be made in Bank notes or accepted cheques, if not objected to at the time of tender.

699. That in cases of Sheriff's sale, the Registrar's certificate be obtained immediately after the seizure.

1050. That in cases over \$100, the Superior Court have concurrent jurisdiction with the Circuit Court, the delays and proceedings for appeal, and fees, being the same as at present.

Many other amendments suggested, some of which are of considerable importance, will be found in the Schedules."

We proceed to notice some of the more important suggestions contained in the Schedules, A and B.

Art. 2. It is suggested that when the Queen's birth-day falls on a Sunday or holiday, the next following juridical day should be non-juridical, and thus a holiday be always secured.

Art. 32. With reference to actions *in forma pauperis*, it is proposed to add that "any party prosecuting an action of damages *in forma pauperis*, shall be liable to *contrainte par corps* for costs awarded to the opposite party." This is of course intended to prevent the institution of vexatious actions of damages by those who have nothing to lose. Mr. MACKAY suggested at the meeting that this might be carried even further, and all *mendicants* bringing actions of damages or petitory actions, subjected to *contrainte*, if unable to pay the costs when their action is dismissed.

Art. 56. The second clause reads thus: "In the absence of a regular domicile, service may be made upon the defendant at his office or place of business, if he has one." It was suggested that this should be made to read as follows: "In the case of a trader, service may

be made upon the defendant at his office or place of business."

Art. 84. With respect to service at the prothonotary's office of orders, rules, notices and other proceedings, upon parties who leave Lower Canada after the commencement of the suit, or have no domicile therein, it is proposed that interrogatories *sur faits et articles* and the *serment décisoire* be excepted. There have been judicial decisions already to this effect; the Statute as it stands being evidently unjust to parties at a distance suing in our Courts.

Art. 90. It is proposed to add: "In cases of *saisie-arêt* after judgment, if the defendant makes default, judgment may be forthwith rendered against the garnishee for the amount by him declared to be due."

Art. 145. It is proposed to expunge this article which reads thus: "No general denial can have any effect, and every fact alleged, the reality or truth of which is not specifically denied, is held to be admitted."

Art. 210—223. The committee recommend that the entire chapter relating to articulations of facts be struck out, these papers being found practically useless.

Art. 235. It is recommended that the expense of interrogatories upon articulated facts be borne by the losing party.

Art. 254. The suggestion is made here that any party to a suit may offer his own testimony. [Mr. ANGUS MORRISON, we observe, has introduced a bill respecting evidence *à nisi prius*, in Upper Canada, which is a step in the same direction.]

Art. 275 restricts cross-examination to the "facts referred to in the examination in chief." It is proposed to extend it to facts "in issue in the cause."

Art. 351, 352. It was suggested by the minority of the committee, including Mr. RITCHIE, that a trial by jury should be allowed in all cases where the amount demanded exceeds \$400.

Art. 355, 356, 357. The minority of the committee recommended that these articles should be struck out, and the following substituted: "The verdict of the jury shall be general, unless the parties agree that special facts be submitted to the jury."

Art. 406. This was altered to read as fol-

lows: "The plaintiff first states his case to the jury, and adduces his evidence. The defendant next states the grounds of his defence, and adduces the proof in support thereof, *and addresses the jury upon the whole case.* The plaintiff is afterwards entitled to reply, and he may, if new facts have been brought out by the defendant, adduce evidence in rebuttal, *in which case the defendant addresses the jury, and the plaintiff replies after the adduction of such evidence in rebuttal.*"

Art. 464. It is recommended, Mr. DOUTRE dissenting, that this article shall read thus: "Peremption is granted without costs," instead of leaving it discretionary with the Court to condemn the plaintiff to pay all costs, as the article now stands.

Art. 484. The Codification Commissioners suggest, in order, as they say, to settle a doubtful point, that distraction of costs can only be demanded before judgment. The Montreal Committee recommend that this be struck out, and that the following be substituted: "Such distraction cannot be demanded later than the juridical day following the judgment." It is the practice in the Court of Appeals not to ask for distraction till after judgment.

Art. 538. The Committee proposed to add the following to the clauses relating to tenders: "but a tender in current notes of any Bank chartered in this Province, or a cheque accepted by such Bank, shall be held valid, unless it be at the time of such tender objected to as not made in current coin."

Art. 543. It is here suggested that if a party, to whom a tender is made in Court, wishes to withdraw the moneys paid in, without prejudicing his claim to the remainder, he shall be obliged to leave an amount, or percentage, to answer the costs that may be awarded to the opposite party.

Art. 601. The Committee recommend that moneys seized or levied, after deducting the duties thereon and taxed costs, must be returned into Court by the Sheriff.

Art. 668. It was proposed to insert the following after this article respecting bids at Sheriff's Sales: "The creditor may also declare in the obligation consented in his favor, what amount, in case of Sheriff's sale or con-

firmation of title, he is willing to give for the property hypothecated, or for any part of it, and in such case the Registrar shall note such declaration in his certificate, and it shall avail as a bid, and need not be supported by affidavit." This is intended to be of service to the holder of a mortgage who may be absent; but some doubt as to its expediency was expressed at the meeting of the bar.

Art. 757. As to the time within which the Sheriff must pay over moneys, the Committee propose that he shall be bound to pay them immediately after the date of the judgment homologating a report of distribution, instead of at the expiration of fifteen days.

Art. 797. This article, the first respecting the issuing of the *capias*, has not been left in a very satisfactory state by the Codification Commissioners. No part of our statute law has given rise to more litigation than that stating the grounds for a *capias*, and yet the Codification Commissioners have framed the article thus: "When the amount claimed exceeds \$40, the plaintiff may obtain, from the Prothonotary of the Superior Court, a writ of summons and arrest against the defendant, if the latter is about to leave immediately the Province of Canada, or if he *secretes* his property with intent to defraud his creditors." This can hardly be called English. The Committee have suggested that the clause be amended by reading "has secreted or is about to secrete" for "*secretes*."

Art. 863. "The plaintiff or the defendant may contest the declaration of the garnishee, upon leave of the Court to that effect." The Committee suggest that the words, "upon leave of the Court &c." be struck out, as the leave of the Court is not asked in such cases.

Art. 875. "If the things seized are of a perishable nature or liable to deteriorate during the pendency of the suit, the Court or Judge may order them to be sold and the proceeds of the sale to be deposited in the office of the prothonotary or clerk." The Committee recommend that this provision be made applicable to every kind of seizure.

Art. 890. "Actions to rescind a lease, or to recover damages resulting from the contravention of any of the stipulations of the lease, or the non-fulfilment of any of the obligations

which the law attaches to it, are instituted either in the Superior Court or in the Circuit Court, according to the value or the amount of the rent, or the amount of damages alleged; and the defendants are summoned as in ordinary suits." The Committee have suggested that this be amended by striking out "or the amount of the rent." There seems to be something strange in this article. Apparently an action to rescind the lease of a store rented at \$1000 per annum, where there happened to be a small item of \$20 damages claimed, would have to be brought in the Circuit Court, and the attorney's fee would be seven shillings and sixpence.

Art. 1050. The Committee suggest that the Circuit Court shall have jurisdiction concurrently with the Superior Court, in suits from \$100 to \$200.

Art. 1178. It is recommended that sureties in appeal shall be bound to justify their solvency upon real estate.

Schedule B, referred to in the report, contained some amendments suggested by Mr. DOUTRE and agreed to by the Committee. The principal points were as follow :

Art. 56. With respect to service: "The boarding-house of a person who is not a householder is considered as his domicile, and the employees of such house as members of his family."

Art. 264. In the Code this article reads: "Deaf mutes, who can read and write, may be admitted as witnesses, their oath and affirmation and their answers being written down by themselves." Mr. DOUTRE suggested the following addition, "and if they do not know how to read or write, they may be interrogated through a person knowing how to communicate with them by signs."

Art. 330. To the grounds here stated for recusing an expert it was proposed to add, "or having expressed beforehand an opinion upon the matter in dispute."

Art. 538. It was proposed to add to the list of exemptions from seizure "sums of money awarded as damages for personal wrongs."

The report, with annexed schedules, was transmitted the same day by Mr. SNOWDON, the Secretary, to Mr. CARTIER.

INSPECTION OF REGISTRY OFFICES.

A bill has been introduced by Mr. CARTIER, to provide a fund towards defraying expenses incurred for matters necessary to the efficiency of the Registry Laws of Lower Canada. The preamble sets out that it is expedient to create a fund for defraying the expenses incident to the inspection of the Registry Offices in Lower Canada, and to the making of the plans and books of reference required by chap. 37, C.S. L.C., respecting the registration of documents affecting real property.

The maximum rates to be imposed on registrations and searches, payable by stamps, are as follows :—

On every will, marriage contract or donation..... 30 cents.

On every deed or instrument effecting or evidencing the sale, exchange, hypothecation or mortgage of real property, for a sum or consideration exceeding in value \$400..... 30 cents.

On every other deed or instrument...15 cents.

On every search, with or without certificate..... 5 cents.

Of course, a provision for the inspection of Registry offices is an excellent provision, if any attention is paid to the reports of the inspectors. But it is well known that a commissioner was appointed some years ago to visit the Montreal Registry office, and made a report exhibiting culpable negligence and carelessness on the part of the officials, and yet things remain as they were to this day.

It may also be worth noticing that a duty of five cents is imposed on all searches. This seems an inconvenient tax, and, moreover, introduces a stamp of a denomination not before used, and to prevent the use of which, Court-house fees of five cents, fifteen cents, and so on, were increased by five cents, so that no stamp of a less denomination than ten cents might be required.

NOTARIAL DEEDS NOT COUNTER-SIGNED.

Mr. LAJOIE has introduced a bill for the purpose of rendering valid certain deeds passed

before notaries now deceased. The principal clause, as amended, reads as follows:—

1. Every notarial deed found in the greffe of any notary deceased before the passing of this act, purporting to have been made before two notaries, but not countersigned by the second notary, *and also every deed purporting to have been made before two notaries, found in the greffe of any notary now living, and which should have been countersigned by a deceased notary, and which shall be found not to have been signed by such deceased notary, before the passing of this act*, except wills and codicils, *are and* shall be as valid to all intents and purposes whatsoever as if they had been countersigned by the second notary during his life; provided always that nothing therein contained shall prejudicially affect any rights already acquired by third persons in virtue of the laws in force at the time of the passing of this Act.

THE OTTAWA DISTRICT.

Mr. WRIGHT, of Ottawa, has called the attention of the House to the petition of P. Ayles and others, of the District of Ottawa, praying for an investigation into the conduct and acts of the Hon. *Aimé Lafontaine*, Judge of the Superior Court for that district. The facts openly asserted in the House on the 24th July, are of the most disgraceful nature, and we intend to take an early opportunity of adverting again both to this matter, and to a motion made by Mr. CAUCHON respecting leaves of absence granted to Judges.

MODE OF CONDUCTING EXECUTIONS.

Mr. MORRIS, following the lead taken in England, has introduced a bill to prevent the execution, in public, of the sentence of death. This Act provides that executions shall take place within the walls, or enclosed yard, of the jail; that the jail physician and the jailor, and other employees to the number of six, together with twelve persons of respectability resident within the district, shall be present. The moment of execution is to be publicly signified by the tolling of a bell, and the hoist-

ing of a black flag; and immediately after the execution the sheriff is to empanel a jury of from six to twelve persons present thereat, who, upon their oaths, on view of the body, shall enquire and find whether the sentence was duly carried into execution.

It is not to be expected that the Act will pass this Session. The abolition of a long-established usage requires much consideration, but we are inclined to think that this is an innovation which will be assented to by a large majority of the public, and especially by those who are the opponents of capital punishment.

THE UPPER CANADA LAW LIST.

Mr. RORDANS, of Toronto, has just issued the fifth edition of his Law List, containing the names of the officers of the various Courts, County and Judicial officers, coroners, commissioners, and the names of practising barristers and attorneys throughout the Upper Province, very carefully classified and arranged. From the last mentioned list, it is evident that the public have no reason to complain of the paucity of their legal advisers, there being about 130 firms and single practitioners in Toronto, and about 540 located in the other cities and villages of the Upper Province. Thus Barrie, the population of which is set down at 3000, is favoured with the presence of eleven lawyers; Bothwell, population 1000, counts eight; Oil Springs, population 3,500, counts fourteen; Welland, population 1000, contains six, and so on.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH—APPEAL SIDE—CROWN CASES.

June 9.

REGINA v. DAoust.

New Trial in Cases of Felony.

The prisoner was convicted by the jury on an indictment for feloniously forging an endorsement of a promissory note. At a subsequent trial for feloniously forging an endorsement of another promissory note, he was acquitted, new evidence of a favourable

nature having been adduced. The judge who presided at both of these trials, granted a motion for a new trial. At the next term, when the day for trial was about to be fixed, another judge was presiding, and he reserved the point, under C. S. L. C., cap. 77, sec. 57, as to whether a new trial could be legally had :—

Held, that the question was properly reserved under the statute.

Held, also, that a new trial after conviction of a felony cannot be legally had.

Semble, that the proper course to be taken by the defendant was to apply for a pardon ; but that the court would not pronounce any opinion upon this part of the case reserved, leaving the Crown Officer at liberty to take such steps as he should think proper.

The following case was stated by Mr. Justice Aylwin for the opinion of the judges, under C. S. L. C., cap. 77, sec. 57. (See 1 L. C. Law Journal, p. 70.)

"Upon an indictment for feloniously forging a certain endorsement of a promissory note, for the payment of the sum of \$300, with intent to defraud, and with a similar count, charging the defendant with uttering the said endorsement with intent to defraud, he was, on the 30th of March last, tried before the Honorable Mr. Justice Mondelet, at this court in Montreal, and found guilty.

On the 20th of April last, upon a motion, founded upon two affidavits (of which motion and affidavits, together with the indictment, copies are annexed), the learned judge ordered that the verdict should be set aside, and awarded a new trial.

On the 25th September last, Mr. *Ramsay*, on behalf of the Crown, moved that a day for the trial should be fixed. Whereupon, being of opinion that I had no authority to take a second trial, after the former verdict of guilty, I directed that the opinion of the Court of Queen's Bench, in Appeal, should be asked : first, whether a second trial can be legally had ; and, secondly, as to the course to be pursued, should there be no authority to take the new trial.

I have now respectfully to ask the opinion of this court, in respect of the premises, and have directed the defendant to be admitted to bail until the first day of the approaching term in appeal.

Montreal, 25th September, 1865."

MONDELET, J.—At the March Term, 1865, of the Court of Queen's Bench, at which I presided, Daoust was tried on an indictment for forgery of an endorsement on a promissory note. From the evidence adduced at the trial there seemed no doubt, and I charged the jury, as I never shrink from doing where my conviction is strong, to return a verdict of guilty, and the jury did so. The most important evidence was that of Desforges, who stated that he had never authorized the prisoner to sign his name. The prisoner was subsequently put upon his trial for forging the same name on another note, and this time the jury found a verdict in his favour, new evidence having been adduced, tending to show that the prisoner had been authorized by Desforges to sign the name. The prisoner now stood between two fires—between a verdict of guilty and a verdict of not guilty. Towards the end of the term, Mr. *Ouimet*, the prisoner's counsel, moved for a new trial on the first indictment, in order that the witness Legault, who testified that Desforges had authorized the prisoner to sign his name, might be heard. Mr. *Johnson*, who then represented the Attorney-General, said that, under the circumstances, he did not think proper to oppose the granting of a new trial. I, having presided at both trials, and being *au fait* with the circumstances of both, having no possible doubt that Daoust either believed himself authorized, or was really authorized to sign the name of Desforges, considered it not only justice, but an imperative duty, to grant a new trial. I wish to be clearly understood on this point. I did this, first, because an imperative sense of justice urged me to it ; and, secondly, because I believed the court had the power to do it. In the following (September) Term, Mr. Justice Aylwin, who was then presiding, reserved the case for the consideration of the full bench.

It will be understood that my conviction must be very strong when I still adhere to it, though I find four judges, for whose abilities I entertain such profound respect, differing from me in opinion. I start from this point : That the Court of Queen's Bench has the power to remedy any evil that comes before it, provided there be no law to the contrary. Starting from this point, I put the

following question :—When the first new trial in a case of misdemeanor was had in England, was there any law that authorized the Court of Queen's Bench to grant it? I believe I am safe in saying that there was none. There being, then, no law, there must have been some principle, and, in my humble opinion, it must have consisted in this unlimited power inherent in the Court of Queen's Bench, to do what it considered necessary in the interests of justice. If these premises are well founded, I proceed to ask, as the Court granted a new trial in a case of misdemeanor for the first time, from the conviction that it had the right and the power to do so, why should it not grant a new trial in cases of felony? Why remedy a small evil, while it left the subject convicted of felony, no recourse? For there is no writ of error where it is a mere question of evidence. I say, then, that if the Court of Queen's Bench has the right to order a new trial in a case of misdemeanor of small importance, it has the right to order it in the more serious case of a felony. It is said that the Courts would constantly be assailed with applications, if new trials were allowed for felonies. But surely that is no reason for refusing to give an innocent man an opportunity of establishing his innocence. Then again, in civil cases, new trials are constantly granted; nor is the trouble imposed on the judges any consideration for refusing them.

But, it is urged, the Courts in England have always refused to grant a new trial in cases of felony. I must say, that in my opinion, this is no reason for continuing to refuse it. Many things have been for centuries refused, and then the old practice has been departed from. Is it not true, for instance, that in all Courts, counsel were prohibited from putting a question in cross-examination that did not proceed from the examination-in-chief? I remember the time myself. So at one time it was asserted that a jury could never be discharged after retiring to deliberate upon their verdict, nor could meat or drink be provided them, till they were agreed.

It is said that a man who has been convicted must go to the Executive and ask for a pardon. Now, I do not relish the idea that an innocent man must go upon his knees be-

fore the Governor-General, or the Attorney-General, and ask for a pardon. Besides, is there not something incongruous in a man saying, "I am innocent, but I want a pardon." There is another case to be mentioned. It might happen in times of high political excitement, such as I hope will never prevail in this country, that the Government might be desirous of getting rid of a formidable opponent, and if a conviction had been obtained against him, would not be inclined to grant a pardon. In Upper Canada a law exists allowing the Court to grant a new trial in cases of felony. Why have we not that law here? I answer, because the Judges have the power to grant a new trial without any special statute. I believe they did not require a statute in Upper Canada; but the people asked for a statute, thinking, perhaps, that the Judges might hesitate about granting a new trial.

MEREDITH, J.—The first point to be considered in this case, is as to whether the main question submitted to us, is one which, under the statute, could be reserved for our opinion.

Upon this subject there has been much difference of opinion upon the Bench in England, and as all the arguments on the one side and on the other, with respect to what questions may be reserved, will be found in the well known case of the Queen v. Miller,* I shall limit myself to a brief statement of the reasons which induce me to think that the question reserved is one which we have power to consider. The words of the law are very general. "The Court before which the case has been tried may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the said Court of Queen's Bench on the appeal side thereof." There can be no doubt that the question: Can there be a new trial in a case of felony, is "a question of law;" and I think that question may be said to have arisen "on the trial," because, to repeat the words made use of by Baron Rolfe (now Lord Cranworth) in the case of the Queen v. Martin,† "the word 'trial' ought to be taken in a liberal sense, and

*Dearsley & Bell, p. 468.

† 3 Cox C.O. p. 451.

includes all the proceedings in the Court below." In the case just cited, the Court for Crown Cases Reserved, composed of Wilde, Chief Justice, Wightman and Cresswell, Justices, and Rolfe and Platt, Barons, unanimously held: that a question of law raised by motion in arrest of judgment, *after the conviction* of the prisoner, may be reserved under the 11th and 12th Victoria, c. 78; that being the English act establishing a Court for Crown Cases Reserved.*

The first question submitted to us by the learned judge is, whether a second trial can be legally had in the present case, it being a case of felony, and I think that this highly important question, may, at this day, be answered in very nearly the same words used by Chitty half a century ago, namely: "in a case of felony or treason it seems to me completely settled that no new trial can be granted."† There is, it is true, one case, the Queen v. Scaife, in which a new trial was granted in a case of felony.

I have looked into several reports of this case,‡ and they all concur in showing that it was argued and decided exclusively on the ground that certain illegal evidence had been received; and not one word was said about the difficulty of allowing a new trial in a case of felony, until all the judges had given their reasons in support of the judgment. But then Mr. Dearsley, the counsel for the prisoner, "suggested that there was a difficulty in ascertaining what rule should be drawn, no precedent having been found for a new trial in a case of felony." To which Lord Campbell answered: "That might have been an argument against our hearing the motion." Now it seems to me that if it might have been an argument against the hearing of the

motion, it might also have been an argument for the reconsideration of the judgment.

It may here be observed that the case just cited had been removed by *certiorari* from the Quarter Sessions to the Court of Queen's Bench, and it appears that where this is done, according to English practice, "the charge is dealt with at the Civil side of the Court, and is subject to all the incidents of a civil cause."* Mr. Dearsley who, from what I have already said, appears to have been the counsel for the prisoner, refers to this case in his small work called "Criminal Process," and, after saying "all the authorities in the books go to show that in cases of felony or treason, no new trial can in any case be granted," adds, "though this position is for the most part correct, it must be received with some qualification." He, then, referring to the decision of the Queen and Scaife, says: "And the principle seems to be this; that where such a case is removed into the Court of Queen's Bench, and is sent down to be tried at *nisi prius*, all the incidents of a trial at *nisi prius* attach to it."

This much is plain, that whatever may be the rule with respect to cases moved by *certiorari* into the Queen's Bench, it seems certain that the rule with respect to cases tried in the ordinary course of law was, when the criminal law of England was extended to this country, and still is, that there cannot be a new trial in cases of treason and felony.

Repeated attempts have been made in Parliament to change the law in this respect, and these attempts have invariably been resisted, not on the ground that the law was not as stated by those who sought a change, but, on the contrary, on the ground that the change proposed would not be an improvement. It is true that in Upper Canada the distinction between misdemeanours and crimes of greater magnitude has been done away with, in so far as regards the right to obtain a new trial; but this has been done by statute, and if legislation for that purpose was necessary in Upper Canada, it is still more necessary here; for it is plain that if an application for a new trial were allowed, it ought to be made to the Court

* See also the Queen v. Webb, 1st. Temple and Mew, p. 23; and 3 Cox. 183. But see also an Irish case, Reg. v. Byrne, 4 Cox. 248, and 1 Cox. 3.

† Chitty's Crim. Law, p. 654, where the author cites 6 T. R. 625, 658. 13th East. 416. See also Russell on Crimes, Ed. of 1843, Vol. II, p. 726, "where the defendant has been convicted on an indictment for felony there can be no new trial."

‡ The case is reported 2 Denison, C.C. p. 281, 17 Ad. & E., p. 239, 79 Vol. E. O. L. Rep. p. 237; and 5 Cox. C.C. p. 243.

* See discussion in House of Commons, Feb. 1860, on "Appeal in Criminal Cases Bill," Mr. McMahon's Speech.

of Queen's Bench sitting in appeal, held by at least four judges, and not to the Court of Queen's Bench on the Crown side, usually held by one judge.* And it is equally plain that under the existing law, such an application could not be made to the Court of Appeals. It is not for this Court to decide whether it is desirable to change our law, so as to admit of a new trial in cases of treason and felony.

I admit that it is difficult in theory to answer the arguments that have been urged for giving a party, in cases of the utmost moment, a right that is freely accorded to him in cases of much less importance; but no one who has had experience in the working of Criminal Courts, can fail to see that there are practical objections of great gravity against the making of the change proposed. The Imperial Parliament upon several occasions has been called upon to consider this subject, and the opinions of almost all the judges were obtained in relation to it.† And we know that the bill which was introduced by Mr. McMahon, in 1860, for the establishment of a Court of Criminal Appeals, the main object of which was to give a

* *Vide Regina v. Bruce*, 10 L. C. Rep. 117.

† Sir Cornwall Lewis, the Secretary of State for the Home Department, in the course of his answer to Mr. McMahon, who introduced the Bill of 1860, observed: "In the year 1848, a Committee of the House of Lords was appointed to consider a Bill which was called 'The Criminal Law Amendment Bill.' When two of the judges, Mr. Baron Parke and Mr. Baron Alderson, both eminent for their knowledge of the Criminal law, were examined on the question to which the present bill referred, Lords Lyndhurst, Brougham and Denman were also examined before the Committee and further, the evidence of Baron Parke and Baron Alderson was sent round to all the Judges, and their opinions with regard to it were requested. What was the result? Baron Parke and Baron Alderson had stated very decidedly their opinion as against an appeal in Criminal cases, and their conclusion was confirmed without the slightest modification by Lords Denman, Lyndhurst and Brougham. At the same time, the following judges concurred with their Lordships by written communication, namely Justices Patteson, Coleridge, Wightman, Erle, Coleman, Maule, Cresswell, Chief Baron Pollock, and Mr. Baron Rolfe. In addition to that the testimony of Mr. Serjeant D'Oyley was against any change; so that, with the exception of Mr. Green and Sir Fitzroy Kelly, all the witnesses were of opinion that the appeal ought not to be allowed."

new trial in cases of treason, was not allowed to be read a second time, and was rejected without a division, and that the same fate attended a bill introduced by Mr. Butt, for the same purpose, in 1861. Another bill was, I believe, introduced in 1864. But all that I know about it is, that in England the law on this subject still remains unchanged. Our law on this subject is the law of England, and in the absence of Provincial Legislation, I think it would be nothing short of a usurpation on our part, were we to attempt to exercise a power which the Imperial Parliament has deliberately and repeatedly refused to grant to any Court in England. For these reasons I am of opinion that the first question submitted to us by the learned Judge ought to be answered in the negative.

The second question proposed, is as to the course to be pursued should there be no authority to take the new trial.

This, it seems to me, I say it with all deference, is a question to be determined by the learned Crown prosecutor, and were we to answer it, I apprehend we would, in effect, offer that learned officer advice for which he has not asked, and by which he might not deem it consistent with his duty to be guided. I, therefore, submit that it will be well for us to abstain, for the present, from the expression of any opinion upon the second question submitted.

DRUMMOND, J., after mentioning that he had himself, while at the bar, moved for a new trial in cases of felony, on several occasions, but without success, observed: The law is fixed by the practice of the Courts. If we are to adopt the principle laid down by Mr. Justice Mondelet—that we have no criminal law but what is contained in the Statutes, and that each judge, where there is no Statute, can wield unlimited power—we may as well close our Courts of Justice. The administration of criminal law would become utterly impossible. The criminal law in this country is the law and the practice of the Courts as it existed in England at the time it was transplanted into this country. Whatever respect I may have for modern judges, if they depart from what was the law at the time it was transplanted into this

country, I shall follow the old law; and this law, as laid down by Kenyon and other eminent judges, was clear beyond doubt that no new trial could be had in cases of felony. We have to administer the law as laid down in the books. If the judges on the present occasion err in their view of the case, they err in about the best company of intellectual men that can be found in the world. We make no order; we merely say that Judge Aylwin was right in reserving the question, and that he was perfectly correct in refusing to proceed with a new trial.

DUVAL, C. J.—It is for the person applying for a thing to point to the Statute which authorizes it, and not to ask, where is the Statute prohibiting the act from being done? There are doubtless good reasons for refusing a new trial in cases of felony, while it is granted for misdemeanours; but it is sufficient for us to say that a second trial cannot legally be had on the indictment against the prisoner.

New trial refused.

G. Ouimet, for the prisoner; T. K. Ramsay, for the Crown.

REGINA v. McDONALD.

Obtaining Goods with intent to defraud.

The defendant was indicted for obtaining goods from T. W. R. with intent to defraud, and convicted on evidence which showed that he had obtained from T. W. R. an order for the delivery of the goods, promising to pay cash, but failing to do so, and becoming insolvent a few days after. He had had other transactions with T. W. R., and had met his engagements in them :—

Held, that the conviction was sustained by the evidence, and could not be disturbed.

The defendant, John McDonald, a trader of Montreal, had been indicted for obtaining goods, with intent to defraud; the specific charge being that on the 25th of May, 1865, at Montreal, he obtained from Thomas Walker Raphael 100 barrels of flour, of the value of \$540, with intent to defraud. The substance of the evidence against the prisoner at the trial was as follows :—

Thomas W. Raphael stated : " On the 25th May last, I made to defendant a cash sale of 100 barrels of flour for \$540. I gave him an order on Halliday & Bros. for the de-

livery of the flour, which was delivered to him. On the 27th, I met him, and asked him for payment. He told me he would pay me on Monday the 29th. On Monday he did not pay me, nor has he paid me at all." On cross-examination, witness stated that he had had other transactions with the prisoner, and this was the only one which had not been met.

John Craig, bookkeeper to T. W. Raphael, deposed as follows : " On my asking what he had done with the \$550, he (the prisoner) answered he had paid a part of it to Laidlaw, Middleton & Co. I asked him if he would return the flour or part of it. He answered he could not, having made away with it. He said also he had no books, and could not say what his assets and liabilities amounted to. I asked him—" At the time you bought that flour from Mr. Raphael, did you know you were unable to pay for it? " He answered, " I did."

The Jury found the defendant guilty. At the trial, the following points were urged by Mr. Carter, Q.C., defendant's counsel, and reserved by Mr. Justice Mondelet, the Judge presiding :—

" 1st, That the indictment did not specify the name of any person or persons intended to be defrauded, such allegation being necessary, as Section 29 of Chap. 99, C.S.C. did not apply to the offence created by Sec. 73 of Chap. 92, C.S.C.

" 2nd, That the evidence did not establish the charge in the indictment, of obtaining so many barrels of flour, but that what he did obtain from the prosecutor was a valuable security, viz., a delivery order."

The case having been argued during the June Term, judgment was delivered June 9th.

DUVAL, C. J. We consider the evidence in this case quite sufficient to justify the verdict. Sentence will, therefore, be pronounced upon the defendant at the next term of the Queen's Bench, sitting on the Crown side.

Meredith, Drummond, and Mondelet, JJ., concurred.

The recorded judgment of the Court was as follows : " After hearing counsel as well on behalf of the prisoner as for the Crown, and

due deliberation had on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered, adjudged and finally determined by the Court now here, pursuant to the Statute in that behalf, that the verdict of the Jury, and the conviction made and rendered against the prisoner, ought not to be disturbed by reason of anything contained in the said case transmitted."

Conviction affirmed.

E. Carter, Q.C., for the defendant; T. K. Ramsay, for the Crown.

REGINA v. PICKUP.

Obtaining a Signature—Fraudulent Intent.

Held:—That a conviction for obtaining a signature to a promissory note, with intent to defraud, cannot be sustained, where the evidence merely shows that the defendant obtained the signature on promising to pay a certain consideration a few days after, which he failed to do; the parties moreover having had other similar transactions together, in which the defendant had met his engagements.

The defendant in this case was convicted during the March term of the Court of Queen's Bench sitting on the Crown side, of obtaining a signature to a promissory note with intent to defraud. The charge laid in the indictment was that the defendant, "on the 28th Sept. 1865, unlawfully, fraudulently and knowingly by false pretences, did obtain the signature of one Robert Graham, to a certain promissory note for a sum of \$1125, with intent to defraud."

Robert Graham, wood-merchant, stated: "On the 26th September last, defendant's son, Edmund James, brought a note dated 14th Sept. 1865, for \$1125. There was another paper with it. It purported that out of those \$1125, when the note was discounted, defendant would return \$550. I did not sign the note at that time. I went to defendant's place of business. He was in my debt then. He agreed when the note would have been discounted, to give \$600, on the proceeds of the note, on what he owed me. I signed the note then. On the 29th September, defendant's son, returning with the old note, dated 14th September 1865, told me the other note had been sent in too late, and left among old papers and

destroyed, and then I signed the note. When I signed the last note, it bore the date of four months. He said there would be no difficulty, that the date had been altered from 4th to 14th September. Endorsed Edmund Pickup. On the 30th September, he told me that it could not be discounted at the Ontario Bank, but as a compliment, at 7 per cent; but at Brown's, a Broker, he could get it discounted, without favor, at 8 per cent; and on my informing him I required the \$600 for the Tuesday, having to pay that sum, on a purchase I had made, he told me it would be all right. On the 4th of October, I went to defendant's office and spoke to his son, who told me his father was not in. I then did not know that defendant had absconded. I have never got the \$600."

Cross-Examination. "There have been between defendant and myself transactions during two years, with me alone. The transactions with defendant amounted to a high figure. If defendant had paid me the \$600, I would have been perfectly satisfied."

There was some additional evidence, showing the defendant's business-standing in Montreal.

The jury found the defendant *guilty*.

At the trial, the following points were urged by Mr. *Carter, Q.C.*, the defendant's counsel, and reserved by Mr. Justice Mondelet, who was presiding:—

1st, That the indictment did not set forth any offence, as it omitted to specify the false pretences by which the signature of the prosecutor was obtained, and that the clause 35 of chap. 99, C.S.C., dispensing with the necessity for averring the false pretences, did not apply to this new offence subsequently created.

2nd, That the indictment, moreover, did not specify the name of any person or persons intended to be defrauded; such allegation being necessary, as this new offence was not mentioned in the clause 29 of chap. 99, C.S.C.

3rd, That the indictment did not specify, with precision, the date of the note, in whose favor it was made, or when and where payable, and did not describe it to be a note for the payment of money.

4th, That the evidence did not establish that the defendant made use of any false pre-

tence of an existing fact, or such a false pretence as by law was necessary to sustain the charge.

5th, That at most a promise for future conduct was proved, viz., to pay the prosecutor, on account of an alleged indebtedness, a certain portion of the amount defendant would receive when the note was discounted.

Judgment was delivered June 9th.

DUVAL, C. J.—In this case we do not think there was such a misrepresentation on the part of the defendant as to justify the verdict, and, in fact, the judge who presided at the trial thinks the verdict should not have been against him. If this verdict could be maintained, it would follow that every man who purchased goods, stating that he would pay for them next week, and who failed to pay for them, could be prosecuted criminally, instead of being sued. We are bound by the evidence as it comes before us, and we are all of opinion that the evidence is insufficient. The defendant is, therefore, discharged.

MONDELET, J.—At the trial I charged the jury for an acquittal, but the jury thought fit to return a verdict of guilty. I then reserved the case for the consideration of the full Bench as to the sufficiency of the evidence, and I entirely concur in the opinion that the evidence is insufficient. There is another consideration that weighs in favor of the defendant. He and Mr. Graham had had previous transactions and accounts together, and the fact of Mr. Pickup's absenting himself from town a few days subsequent to the particular transaction on which the prosecution was based, could not be adduced to justify the presumption of fraud. I instructed the jury at the time that they must consider the transaction apart from any subsequent act.

Conviction quashed.

E. Carter, Q.C., for the defendant.

T. K. Ramsay, for the Crown.

Master's Wages—Maritime Lien—Under the 10th section of the Admiralty Court Act, 1861, (24 Vic. c. 10,) the master has a maritime lien both for his wages and disbursements, and his claim is therefore to be preferred to the claim of a mortgagee. *The Mary Ann*, Law Rep. A. & E. p. 8.

COURT OF REVIEW, MONTREAL— JUDGMENTS.

March 31.

DUVERNAY v. CORPORATION OF PARISH OF ST. BARTHELEMI.

Practice—Notice of Appearance in Circuit Court Appealable Case—Setting aside Appearance.

Held, that when an appearance is filed, it cannot be rejected, except on motion by the plaintiff in court.

Semble, (MONK J. *dissenting*), that it is not necessary for the defendant, in an appealable Circuit Court case, to give notice of his appearance to the opposite party.

SMITH, J.—In this case judgment had been rendered by default in the court below, and the defendants now asked to have the judgment revised. The question to be decided was simply this: Is it necessary for the defendant, in a Circuit Court appealable case, to give notice of his appearance to the opposite party; and, further, can the prothonotary, after receiving such appearance, take upon himself to reject it as irregular? The defendants had appeared in the suit, but no notice of the appearance had been given to the opposite party. The paper was received; but afterwards it was set aside, and the case treated as a case by default. The defendants now appealed, and the court was of opinion that the appeal was well founded. There was nothing in the statute requiring notice of appearance in the Circuit Court. The moment an appearance was presented, it was the duty of the prothonotary to accept it. His authority and jurisdiction ceased there. If improperly filed, it was for the court to reject it on motion. This case had been treated as if no appearance had been filed. The judgment must, therefore, be reversed.

BERTHELOT, J., concurred.

MONK, A. J., concurred in reversing the judgment. But he was of opinion that in appealable cases it was necessary to give notice to the opposite party of an appearance. Such, at all events, had been the invariable practice. He, in chambers, had ordered the prothonotary to reject the appearance, and enter up judgment for the plaintiff. This was not the proper mode of proceeding, and the

judgment, accordingly, must be reversed; but he was not inclined to hold absolutely that notice was unnecessary.

Judgment reversed.

FARRELL v. GLASSFORD, *et al.*

Partnership.

A steamboat captain advanced monies to the owners, on their promise to admit him as a partner. It did not appear, from the evidence, that the promise was carried out. Losses having been incurred in running the vessel, it was broken up.

Held, that the captain had not become a partner, and was not liable for any share of the losses.

SMITH, J. This is an action brought by the plaintiff against the firm of Glassford, Jones & Co., to recover about \$1200, for money advanced by him, for salary, and for superintending the building of a steamboat. The defendants set up an agreement by which the plaintiff was to become a partner in the steamer to the extent of 8-64ths, and that the advance he made was to enable him to become such joint owner. The defendants acknowledge that plaintiff was their steamboat captain, but deny that he ever superintended the building of the steamer in question. They say, that by reason of plaintiff agreeing to become copartner, they ran the boat, and at the end of the season found that they had incurred a heavy loss. They contend that the plaintiff's share of this loss more than sets off the amount due him for his advances, &c. and therefore his action should be dismissed. The question then is, did Farrell ever become a partner? It appears that he advanced a certain sum of money, on the promise that within a certain period he was to receive a share. It was the duty of the defendants to have offered him this share. As the case stands, there was nothing more than a promise to admit him to a share. This promise was never fulfilled. Therefore, the only question is, whether the plaintiff is entitled to recover back the advance made for the purpose of becoming a partner. There can be no doubt that he paid this money in the hope of getting a share, and this share was never offered to him. At the close of the season the defendants broke the vessel up, as sole

owners, without the plaintiff's participation. There can be no doubt, that under the circumstances, he is entitled to get back his money. The judgment must be confirmed in all respects.

Berthelot and Monk, JJ., concurred.

LOISELLE *et al.* v. LOISELLE.

Deposit in Court of Review.

SMITH, J. This is an application on the part of the defendant, that the prothonotary be ordered to receive his inscription for revision, without the deposit, with consent of plaintiff. This is an application which the Court cannot entertain. The prothonotary is by law liable for the deposit, as soon as the case is inscribed, because the law says that the deposit must be made. The prothonotary may make any arrangement he chooses, but he still continues liable. Motion rejected.

Badgley and Berthelot, JJ., concurred.

MASSON *et al.* v. JOHN MCGOWAN, and PETER MCGOWAN, opposant, and MASSON, contesting.

Insolvency—Fraudulent Sale.

John McG., an insolvent trader, made a transfer of his moveable and immoveable property to his brother Peter, a sailor, who afterwards executed a lease back to John. The immoveable property being seized by John's creditors:—

Held, that the transfer was fraudulent; that Peter must be presumed to be acquainted with his brother's circumstances.

Held, also, that the plea of *chose jugée* was good; the transfer having previously been declared invalid in a contestation as to the moveable property.

SMITH, J. In this case I have the misfortune to differ. The firm of Masson & Co. sued McGowan on a promissory note, and seized his moveable effects by a *saisie-arêt* before judgment. This was in 1855. In 1856, before a judgment was obtained in the Court, John McGowan made a transfer of his estate to his brother Peter. In 1857, the farm which had been transferred to Peter, was seized as belonging to John. Peter opposed the seizure, alleging that he had acquired the property for valid consideration, and had been in possession for two years. It is pretended that John McGowan & Co. were insolvent; but there does not appear to be any proof of their insolvency. Their effects have never been discussed. The

plaintiff, after getting his judgment, sued out an execution against the real estate of John McGowan, and seized it as in his possession. The bailiff's return, however, shows that the property was not in the possession of John when seized, and there is not one word of evidence to show that it then belonged to John. The first question is this: Can you take out an execution *de plano* against a man, and seize property, as his, in the possession of another? I think that when property has passed out of the possession of the debtor into the hands of a third party, who holds it in good faith, it cannot be seized under an execution. There may be an action in *fraudem creditoris*. Even admitting that there is fraud, you cannot seize A's property under an execution, in the possession of B. The moment that the debtor's property has passed into the possession of a third party, under a title, it is only by a revocatory action that it can be brought back to the creditors. It may be brought back by a process, but not by a seizure. Besides the plea of fraud in this case, there was a plea of *chose jugée*. There was a decision when the moveables were seized, that there had been no legal transfer of the moveables to Peter; and now, when the immoveables are seized, it is contended that the previous decision has the force of *chose jugée*. I am of opinion that the plea of *chose jugée*, as well as the plea of fraud, is unfounded, and should be dismissed.

BADGLEY, J. It is necessary to examine the facts in this case, as they appear on the face of the record. In 1855, John McGowan & Co. were carrying on business at Vaudreuil, and in that year they became indebted to the plaintiffs, Masson & Co., in a considerable sum of money, first, in March, in the sum of £23 for goods sold and delivered, and subsequently in various amounts on notes, &c., in all about £370. The firm paid no part of these sums as they became due; they were, in fact, insolvent, and unable to pay anything. On the 3rd Dec., when they still owed the plaintiffs this sum of £370, and other amounts to other parties, swelling their indebtedness to a total of £800, John McGowan, the head partner, transferred to his brother Peter a farm that belonged to him, and not only the farm, but

all the farm stock that was upon it, consisting of five horses, waggons, &c. At this time Peter McGowan was not a trader nor a farmer; he was a sailor. In this way he became the *cessionnaire* of the farm and of all the stock upon it. Early in January following, the plaintiff sued out a writ of attachment, and seized all the goods belonging to the partnership firm. These goods realized £150, while the firm owed £800. It is pretended that there was a large amount in debts due to the firm, but experience teaches us how little such debts in the country are worth; and, in fact, there is the evidence of the collecting bailiff that he had a large amount of debts in his hands, but that they were all prescribed. Does this show that John McGowan was solvent? It is said that his partner was solvent; but this did not make John solvent. He was then hopelessly insolvent, not having paid even the first £23 due for goods in March, or any part of the subsequent liabilities, yet he ceded to his brother the only immoveable and moveable property he possessed in the world.

From this statement of facts, I make the deduction, not only that John was a bankrupt, but that Peter knew the circumstances under which John made the transfer to him, and that it was made for the purpose of secreting the property from John's creditors. John had allowed his father and sisters to occupy this property, and, after the transfer, he went and resided there with his sisters. In fact, in the deed of cession, John reserved to himself and his wife the right of occupation of half the house for their lifetime, and when he found his affairs so involved that he was unable to carry on his business, he removed into the house, and lived there on the farm. Further, in 1857, Peter, who was a sailor, made a lease to his brother John, for three years, of this very property. These transactions were kept very quiet; no one knew anything about them, except the few to whom they were communicated. One of the witnesses states that during the whole time, John was the apparent and reputed proprietor of the farm. Under these circumstances, the possession of the farm was in John. The *procès-verbal* says that service could not be

made on John, because he was away. Mr. Shepherd, who was the opposant's own witness, refers in his testimony to circumstances which occurred in 1855. He states that in the fall of 1855, and the beginning of 1856, he knew from Peter, who was then in his employ, that there were some difficulties about the property likely to be raised by the creditors of John. The testimony of Mr. Shepherd shows that Peter had a perfect knowledge of the affairs of John, and it is only natural to suppose that one brother should be acquainted with the affairs of the other. On the 9th of April, 1857, Peter made to John a deed of lease, for three years, of the farm and farm stock which had been transferred to him, and this being seized at the instance of the creditors, Peter filed an opposition, claiming the property as his own. The opposition is contested on two grounds; first, that there was *chose jugée*, and, secondly, upon the merits.

With reference to the second ground, it seems to the majority of the Court on the facts as proved, that the insolvency of John was complete at the time he transferred his property to Peter, and, therefore, the latter had no title to the farm. It is very true, that in these matters of fraud, our law has no particular rules for indicating what fraud is. Fraud is so peculiar in itself, and is made up of so many circumstances, that the decision in every case must be guided by its own particular circumstances. But there are certain principles which it is right to consider in a case of this kind; and one of these principles is with reference to insolvency—that when a debtor ceases to meet his commercial engagements, and has become insolvent, everything he does in this state of insolvency in disposing of his property, is wrong, so far as his creditors are concerned. In this case the farm was withdrawn from the creditors; and there is no clear information as to the consideration for the transfer. It is only upon receipts for money alleged to have been paid that the Court is called upon to say that this was a valid transfer. Mr. Shepherd says the farm was worth £500, and the most that can be made up as paid by Peter is £350, so that there would be £150 to come to the

creditors. A person treating with an insolvent is bound to know the position of the party with whom he treats. To know of a fraud, and to participate in it, is an act of complicity, and the person thus concurring in a fraud must repair his own act, and make reparation by annulling the deed at his own cost. The quality of the party must also be taken into consideration; the proximity of relationship, because the interests of near relations are presumed to be the same. The relationship of John and Peter, brothers living together, shows such proximity that their interests are presumed by law to be the same. Then there is the retention of the transferred property. John reserved to himself the right of living on the property, and this not for a short time, but for his own lifetime, and for the lifetime of his wife. Two months after the transfer, he entered into possession of the property and remained there for three years afterwards, having in the meantime taken a lease of it from his brother.

Next, as to the first plea of *chose jugée*. A judgment was rendered in 1861 upon a similar contestation raised by the plaintiff; the only difference being that that contestation arose upon a writ of *fieri facias de bonis*, while this contestation is upon a writ *de terris*. The judgment of 1861 declared the transfer to be fraudulent, and annulled the deed. That judgment has not been appealed from; Peter was a party to it, and it is that judgment which is now set up under the plea of *chose jugée*. In order that this plea may apply, there must be identity of object, of cause, and of parties. The identity of object is not in question here; but the case turns upon the second point, namely, the identity of the contestation, or cause. The same thing may be due for several distinct causes, and therefore a judgment upon one cause, is not a *chose jugée* upon another cause. A judgment upon the form is not a *res judicata* upon the essence of the deed. But a judgment between the same contestants, on a convention, is final as regards the convention itself. It takes away its existence. It was the vice in the convention that was the *fond* of the judgment here, and it is the same vice in the convention that is now attacked. That vice once determined by a

judgment, the jurisdiction of the Court with reference to that convention is a *res judicata*. It is asserted, however, that the nullity pronounced by the judgment applied only to the moveables, and not to the immoveables. But there was only one contract between the parties. John sold his farm and his farm stock, and Peter bought the farm and the farm stock, by one convention, and for one consideration passing from the seller to the purchaser. A deed may be resiliated, it is true, for one head, and not for another; but when a deed contains several heads, and the whole passes for one price, the judgment then applies to the whole, and the deed itself is annulled. Under the circumstances, this Court, in revising the judgment, agrees with the *dispositifs*, both upon the first and the second point. The judgment will therefore be maintained, opposant to pay the costs of revision.

Monk, J., concurred.

SHERIDAN *et al.* v. BOURNE.

Procedure—Foreclosure.

The Court, in its discretion, permitted the defendant, on payment of costs, to file his plea after foreclosure, where the plea was ready, and deposited on the day of foreclosure.

BADLEY, J. This case, from the district of Iberville, comes up on a matter of procedure. As a general rule, the Court is not disposed to interfere with the discretion exercised by judges in matters of procedure. But in this case there has been a final judgment, and the case comes up in such a way as to justify the Court in interfering. The action was returned and the defendant called upon to file his plea. A day or two after, the defendant filed a motion that all proceedings be suspended till the termination of the *litis* between the parties, in another case, in which the same things were in contestation. The parties remained in this position till September, after the vacation, when the plaintiff foreclosed the defendant from pleading. The defendant had his plea ready, and filed it on the same day that he was foreclosed, having apparently desired to get as long a delay as possible. The Court at Iberville rejected the plea and allowed the plaintiff to proceed *ex parte*. The case now comes up on the final judgment.

This Court is disposed to think that the course adopted was too strict. The plaintiff knew that the plea was filed, because he moved immediately to reject it. Under the circumstances the Court is disposed to revise the judgment and allow the plea to stand. But as the defendant has obtained so long a delay, and as it was his own fault that he did not file his plea sooner, he must pay the costs of the action, which, to avoid any difficulty hereafter, will be taxed by the judgment at \$30, otherwise the first judgment will stand.

Berthelot and Monk, JJ., concurred.

PREVOST v. POIRIER.

Mortgage—Amount due to be specified.

BADLEY, J. This is an action *en interruption de prescription*, brought by the plaintiff against the *tiers détenteur*, who has acquired certain property on which plaintiff holds a mortgage under a transfer. The defendant pleads in the first instance that there is no mortgage, because, in the transfer, the amount due is not stated. It appears from the deeds, however, that the amount due is 1700 *livres*, the land having originally been sold for 4700 *livres*, of which 3000 *livres* have been paid. Consequently, the provision of the Registry law, which requires the amount to be stated in the mortgage, is satisfied. The object of the action was simply to prevent prescription from being acquired. The judgment in plaintiff's favour must, therefore, be confirmed.

Smith, and Monk, JJ., concurred.

DEAL v. CORPORATION OF PHILIPSBURG.

Municipal Council—Expropriation.

The proceedings of a Municipal Council, which caused the plaintiff's fence to be taken down, and expropriated part of his land, for the purpose of changing the direction of a certain road, without having caused the land to be valued by valuers, were held illegal and set aside.

BADLEY, J. This is an action for \$400 damages against the Corporation of Philipsburg, a small Corporation included in that of St. Armand West, and one of the old Corporations constituted by Royal Letters Patent. This local Corporation was very anxious to change the direction of a certain road, so that

it might reach a particular point in St. Armand West, which would bring its people nearer to the Railway Station, and an application to this effect was made to the County Council. An inspector went to see the road, and returned his *procès-verbal* to the proper officer; and immediately persons were set to work to make the road, who tore down the plaintiff's fence. The plaintiff now claims a certain amount of damages. The plea is that all the proceedings were regularly taken, and that the road is in reality conferring an advantage upon the plaintiff. The latter answers that it may be an advantage, but he has a right to be heard in the matter. He further alleges that all the proceedings taken were contrary to law, and sets out no less than seven or eight different grounds of objection to the proceedings. The judges are all of opinion that these grounds are tenable to the full extent. The judgment that was rendered in the Court below went upon the 71st section of the law, which says that no objections of mere form shall be allowed to prevail in any action under this act, unless special injustice would be done by not allowing the objection. This is a clause to be found in a good many acts, and is intended to prevent mere groundless opposition. But it is a different case where the substantial rights of the parties are concerned. And further, the law provides that no person shall be deprived of his property till valuers have gone and estimated the value, and settled whether anything is to be paid. In this case there was no valuation of the property. The defendants went at once and took down the plaintiff's fence. The Court is of opinion that the Municipal Council had no right to proceed in that manner. The judgment appealed from must, therefore, be set aside, and damages to the extent of \$25 will be awarded to the plaintiff, with costs as of lowest class, Superior Court.

Berthelot, and Monk, JJ., concurred.

SUPERIOR COURT.

LACOSTE v. JODOIN.

Transfer—Costs of opposition.

Held, that a *cessionnaire* is entitled to the costs of an opposition necessary for the pur-

pose of establishing his title, though the deed of transfer be not enregistered.

SMITH, J. A question was raised in this case as to the opponent's right to costs of opposition. The law says that a man whose title is not registered, is not entitled to the costs of his opposition. The opposition in this case was filed by a *cessionnaire*, who claims under the deed of cession, which is not registered. Is he entitled to the costs of the opposition? The original deed of the *cédant* was registered, and the law does not render it imperative on the *cessionnaire* to register his title. The Court, therefore, is of opinion that he is entitled to the costs of the opposition, because he had no other way of establishing his title. Contestation rejected and report maintained.

HUBERT *et ux.* v. RENAUD *dît* DESLAURIERS.

Execution.

Held, that the plaintiff in a suit has no right to accompany the bailiff when the latter is executing the writ.

SMITH, J. This is an action of damages. The question arises, whether the plaintiff in a suit has a right to accompany a bailiff in the execution of the writ. In this case the defendant in the suit went with the bailiff, and his appearance so incensed the lady of the house, that he was obliged to hold up a chair in front of him to protect himself, while she poked at him with a long stick, and cried to him to be gone about his business. The defendant was the most in fault. He had no right to be there. He should not have gone to provoke the woman. The plaintiff will have judgment for \$25 damages, with costs as of the lowest class, Superior Court.

TOURVILLE *et al.* v. BELL *et al.*

Partnership.

H. being sued jointly with *B.* as the firm of *B. & H.*, pleaded that the firm was composed of himself and *B.'s* wife. The partnership was not registered till after action brought, and credit was given to *B. & H.*, the reputed firm:—

Held, that under the circumstances, *H.* was liable.

BADGLEY, J. This is an action brought for goods sold and delivered, under the following circumstances:—The goods were purchased by

the firm of Bell & Higgins. Bell was married to a sister of Higgins, and some years ago Mrs. Bell obtained a *séparation de biens*. It is said that she carried on business with Higgins under the firm of Bell & Higgins; but the partnership was never registered until after the present action was brought. In the meantime her husband continued to buy and sell. No one knew till the plea was filed, that there was a Mrs. Bell, and that she was the partner in the business. No intimation whatever was given to the parties from whom Bell purchased, that Mrs. Bell was the real partner, nor was credit given to her. The plaintiff having brought his action, the case proceeded *ex parte* against Bell; but Higgins said he never was the partner of Mr. Bell, but of Mrs. Bell, and he attempted to prove it by producing the certificate of registration of partnership, the registration being posterior to the institution of the action. This is not enough. Credit was obtained in the name of the two men. Judgment will, therefore, go in favour of the plaintiff for the amount claimed.

RUSSELL v. GUERTIN *et al.*

Sale—Possession.

Held, where a person sold the timber upon certain property to two different parties, who both had possession, that the title of the first vendee was to be preferred to that of the subsequent purchaser.

BADGLEY, J. This is an action to recover the value of some timber which was cut down. On the 21st July, 1865, Baxter, the party then in possession of certain property, sold to Cosgrove the white pine timber upon the land in question by a written agreement. The timber was to be cut in November following, and to be paid for at the rate of \$8 per thousand feet. The area of the land was 256 acres. On the 1st November following, Cosgrove assigned his rights to the plaintiff under a written engagement, for consideration stated to have been received. We have, therefore, the chain of title clearly and strongly deduced. It appears, however, that Baxter afterwards, in October, sold to the defendant, Guertin, who entered upon the land and cut down 210 trees. This timber, it is proved, was of the most valuable description, being the first cut upon the land: and the average length was between

seventy and eighty feet. Cosgrove was to pay \$8 per 1000 feet, 210 trees at 70 feet would make 14,700 feet equal to about \$120. On the other hand, taking 210 trees at \$3, the proved value, it would amount to \$630. The question of right in the timber is mixed up with possession. There is no doubt of the sales by Baxter to the defendant Guertin, and also to Cosgrove. Both sales were made by the same person, the latter in July and the former in October. It appears that Guertin only overcame Baxter's repugnance to sell to him also, by telling him Cosgrove's purchase was not valid, because the latter had not paid any earnest. The sale to Cosgrove, however, was a perfect bargain between Cosgrove and Baxter, and nothing further was required to be done. Baxter himself had no right to depart from it. When Guertin went upon the land to cut timber, the plaintiff forbade him to proceed, but Guertin went on cutting trees, which the plaintiff marked with his own mark. So not only was Guertin aware that the timber was cut, but he was also aware that the 210 trees were all marked with the plaintiff's mark. The timber was then floated down to the mouth of the Gati-neau, and while it was floating about there the plaintiff attempted to raft it, but Guertin would not permit him to do so. The plaintiff then took out a *saisie-revendication*, and the timber was placed under the care of two guardians. Guertin, however, apparently thinking that he was out of the reach of the law in those parts, floated away the two rafts, with the two guardians on them, to the opposite side of the river. When they reached St. Genevieve, another attachment was taken out, and by this the timber was seized and brought under the jurisdiction of the Court. Under the circumstances, the Court is of opinion that the original title to Cosgrove was a good title, and could not be interfered with by Guertin. It preceded the contract of the latter, and must be preferred to it. Guertin alleges that he entered on the land first; but when Baxter went over the land with Cosgrove, he gave Cosgrove possession of the timber as far as it was possible to do so. Both having had possession, the question is, whose possession was the best. In order to settle this point, it is

necessary to go back to the titles. Now Coe-grove had both the first title and possession. Guertin's subsequent possession can not prevail over this. Judgment will therefore go maintaining the *saisine-revendication* for the value of the timber, at \$3 per tree.

LIGHTHALL v. WALKER.

Verbal Slander—Taxation of Witness struck off.

Held, that the use of the term "loafer" in reference to a person, gives ground for damages.

Held, also, that where the evidence shows that the suit has been maliciously instigated and urged on by a witness, the taxation of such witness will be struck off.

BADGLEY, J.—This is an action to recover damages for verbal slander, brought by a notary of respectable standing in the city. The upper floor of defendant's house is occupied by a clergyman named Donaldson. On this upper floor was by a sink, by which the dirty water was sent down. Unfortunately, the defendant is a married man, and as it happened, the ladies of the two families were not quite harmonious in their intercourse; and long before the present action was brought, considerable differences existed. On one occasion these dissensions grew to such a height, that the Rev. Mr. Donaldson instructed the plaintiff with whom as an elder of his Church he had some acquaintance, to serve a protest upon the defendant on account of the defective state of the premises. On the day this protest was served, there was more than usual excitement about the dirty water from the upper story, some of which, owing to the condition of the sink, fell down upon the cradle in which the defendant's child was sleeping. The lady on the lower story was not pleased to see her child bathed in this dirty water, and when the plaintiff came to serve the protest, she was in a particularly bad humour. When the defendant, her husband, came home, the events of the day were of course communicated to him. He was told not only of the protest, but also about the dirty water, and the injury to the child. The defendant, with some reason in his proceedings, called in a neighbour, a respectable woman, as a witness, and went up to Donaldson's premises, to speak to

him about the overflowing of the sink. They accordingly ascended the stairs, and not wishing to open the door improperly, knocked on the partition. This brought out Mrs. Donaldson, Mr. Donaldson remaining inside, and hearing what was going on. Walker began at once by saying that it was very wrong to allow the sink to overflow in this way, and one word led to another, till Walker said, "Why did you allow a loafer like that Lighthall to come and bring me a paper," and added some further imputations on that gentleman's character. Then the clergyman told him he would kick him down stairs if he didn't go at once, and used most abusive language with reference to him. He afterwards went to Walker's office to pay his rent. Walker not being in, Donaldson amused himself by abusing Walker to strangers in the place, and in fact, brought a man with him expressly to hear how he abused Walker. He also declared, "I will ruin him and see him on the street within six months; he has a house to pay for and I have none." He further spoke of his being a Minister of Christ, and likened his treatment of the defendant to the chastening which God inflicts on his erring children for their good. A man who could conduct himself in this way is not one upon whose testimony much reliance can be placed. Having told the plaintiff the story of how Walker had abused him, and said, according to his version, "Why did you send that miserable loafer, Lighthall, who had to fly from his country, to serve me with a paper?" he succeeded in inducing Mr. Lighthall to bring the present action. It is proper to state that there is not a tittle of evidence in the record that can injure the character of Mr. Lighthall. No credit is to be attached to the evidence of Donaldson and his wife. The Court will take, in preference to the statements of these people, the evidence of the woman who accompanied Walker up the stairs. She states that the words mentioned above were never spoken, though she admits that Walker did make use of the word 'loafer' in reference to Mr. Lighthall. In using this word he employed a most offensive term, which was altogether unjustifiable. He had no business to bring the name of Mr. Lighthall into his

quarrels with Donaldson. The plaintiff has thus been exposed to the trouble and annoyance of bringing an action of this description. Under these circumstances the Court cannot justify the defendant. He must learn to speak more circumspectly. It is true that this action has been stirred up by Donaldson, whose conduct throughout has been most improper. The Court will, in consequence of this, order his taxation as a witness to be struck off, as it cannot be permitted that a witness shall be paid in a case which he has prompted and instigated. The defendant will be condemned to pay \$25 damages, and costs as of the lowest class in the Superior Court.

RYLAND v. ROUTH.

Court of Review—Deposit.

Held, that the deposit in the Court of Review will not be paid over to the successful party, when an appeal is taken from the decision in Review.

BERTHELOT, J. In this case an appeal was taken from the decision of the Court of Review, and the plaintiff, who has been successful in the latter Court, now moves that the deposit be paid to him at once. The Court is of opinion that while the case remains undecided, owing to the pending appeal, the application cannot be granted, as the costs must abide the final decision.—Motion rejected.

RECENT ENGLISH DECISIONS.

Negligence—Railway Company—Level Crossings—Injury to foot passenger—Absence of Protection for Carriage Traffic.—The defendants' railway crossed on a level a public carriage and footway near to the P. station. There were gates across the carriage-way, and a turnstile for the use of foot-passengers. S., a foot-passenger, whilst traversing the railway at the level crossing, was knocked down and killed by one of the defendants' trains. At the time of the accident, contrary to the provisions, by statute and by the defendants' rules, for the safety of carriage-traffic, the gates on one side of the line were partially open, and there was no gatekeeper present to take charge of them; although no traffic was passing across, and although a train was overdue. In an action against the defendants by the

executors of S.:—*Held*, that there was, under the circumstances, evidence of negligence on the part of the defendants to go to the jury. inasmuch as by neglecting the required precautions for the safety of carriage traffic, the defendants might be considered to have intimated that their line might safely be traversed by foot passengers. *Stapley v. The London, Brighton, and South Coast Railway Co. Ex. 21.* Baron Channell remarked: "At the time of the accident one of the carriage gates was open. It did not exactly appear how the gate came to be open. Half an hour before it was proved to have been shut. Nor does it appear how the deceased got on to the line, whether through the open carriage gate or through the turnstile. Now, upon the part of the company, it was argued that whatever obligations they were under for the protection of carriage traffic, neither the statutes nor the rules applied to the case of foot passengers. But by rules 219 and 220 it is provided, that 'the gates must be kept shut across the carriage road, except when required to be opened to permit the railway to be crossed;' and that before opening them the gateman must satisfy himself that 'no train or engine is due or in sight.' In this case the gate was open, there was no gateman present, and the train was overdue. Supposing, then, the case had been one of a carriage passenger, there would have been negligence proved against the company. Then, the carriage gate being open, and no gatekeeper present, a foot passenger was invited by that state of things to pass across the line, and the conduct of the company, therefore, was, we think, evidence of negligence to go to the jury. The case depends upon the principle of *Bilbee v. The London, Brighton, and South Coast Railway Company*. We adopt the opinion there expressed by Erle, C. J., that we ought to be careful not to impose any undue burdens on railway companies that are not imposed on them by act of parliament, and we do not say that a railway company must keep servants at every crossing. At the same time, we concur in the view, that the company are not to be exempt from using due and ordinary care, although their statute gives them the right of crossing public ways on a level."

Injunction — Railway Company — Inequality of Charge for "Packed Parcels."—The plaintiff, a "packed parcel" carrier, having been charged by the defendants, and having paid to them under protest, a sum for the carriage of his packed parcels beyond the sum charged by them to certain wholesale houses, for the carriage of goods of a similar description, brought an action against them to recover the amount of the overcharge, and obtained a verdict, which was afterwards upheld in the Exchequer Chamber, upon argument of a bill of exceptions. The defendants continued, however, to make the same charges, and to receive the same sums of money from the plaintiff for the carriage of his goods, as before, and he therefore issued a fresh writ to recover the money paid by him during another and more recent interval of time. After issuing the writ, he applied, under the provisions of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125,) ss. 79, 82, for an injunction to restrain the defendants from charging him for the carriage of his goods, "otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances:"—

Held, that the case was not one in which the Court would exercise their statutory power to grant an injunction. *Sutton v. The South Eastern Railway Co. Ex. 32.* Pollock, C. B. observed, "I think we ought to be very cautious in dealing with this power which has been conferred upon us, in cases where there can be no appeal from our decision. * * * It is not true that the plaintiff has no other adequate remedy. He can recover his money back again, and, as I think, can recover it back with interest. The inconvenience, moreover, of granting this injunction might be very considerable; and by doing so, we should not effect any advantage to the plaintiff. * * * It is much better that the plaintiff should appeal at once to a jury, directly and not indirectly, for any infringement of his rights which he may have suffered."

PROBATE, MATRIMONIAL AND DIVORCE.

Will — Execution — Position of Testator's Signature.—A will ended on the middle of the

second page of a folded sheet of paper, and the rest of the page was in blank. The attestation clause and the signatures of the testator and the attesting witnesses were written on the third page, the signature of the testator being opposite to the clause appointing executors, the attestation clause being written beneath the signatures and ending opposite to the concluding words of the will, and the signatures of the attesting witnesses being at the bottom of the attestation clause:—*Held*, on motion, that the signature was so placed beside or opposite to the end of the will, that it was apparent on the face of the will, that the testator intended to give effect by such his signature to the writing signed as his will, and that the will was therefore entitled to probate under 15 Vic. c. 24, s. 1. In the *Goods of Williams, P. M. & D.*, p. 4.

Will — Ambiguity — Parol Evidence — Mistake.—A testator duly executed a will and five codicils. The fourth codicil revoked the three preceding codicils, and the fifth codicil confirmed the will and the four codicils. Parol evidence was admitted to explain the ambiguity of these codicils, and it was proved that the confirmation of the will and four codicils contained in the fifth codicil was a mistake, the intention of the testator being to confirm the will and the fourth codicil. Probate was granted, on motion, of the will and the fourth and fifth codicils only. In the *Goods of Thompson, P. M. & D.* p. 8. Sir J. P. Wilde said: "There is sufficient ambiguity in the codicils to let in parol evidence to explain it, and on that evidence I will grant probate of the will and the fourth and fifth codicils only."

Seaman's Will — Surgeon in the Navy.—A surgeon in the navy was invalided at a foreign station, and wrote a letter at sea, on board a steam-ship, on which he was a passenger homewards, containing directions as to the manner in which he wished his property to be disposed of:—

Held, first, that a surgeon in the navy was a mariner or seaman within the provision contained in 29 Car. 2, c. 3, s. 23, and 1 Vict. c. 26, s. 11, exempting mariners or seamen, being at sea, from making formal wills.

Secondly, that although the deceased was not on duty at the date of the letter, yet as he was returning from service, this will was entitled to probate, as made at sea. In the Goods of Daniel Saunders, P. M. & D. p. 16. The will was a letter written by deceased to his brother in the following terms:—

"P. & O. Steamer, 'Cadiz,' 12 hours from Hongkong, China, June, 1865.

"My dear George, I am very ill, and am daily getting more exhausted, so I endeavour to write my last wishes. I was invalidated at Yokohama, June 8, 1865, for disease of the liver of four months' standing, and sent home overland for the preservation of my life. The small note contains a cheque for £396, &c., which I wish to be equally divided between my dear mother, three sisters, and yourself. There is also in the funds some £1200 belonging to me. Mr. Lawrence has the whole management of this, and you can write to him and ask him to send the whole amount to you, which I wish to be equally divided between you all. There is also money in my portmanteau in the leather bag, and there will be some residue of pay due to me from the Admiralty. Mr. Lawrence will assist you, I dare say. I wish to leave Mr. Lawrence £40 to purchase a mourning ring in my memory. This is all I am able to write at present. God bless you all; Amen. My love to all. I am completely exhausted. A long farewell to you all, my dear relatives; and may the Lord bless and protect you all is my last wish in this world; and when I do depart, may the Lord receive my soul is my fervent prayer.

I am, your loving brother,

D. SAUNDERS, R. N.

"At sea, June 25, 1865. Near Hongkong, China."

Dissolution of Marriage.—In a suit for dissolution of marriage, the only evidence of adultery consisted of written and verbal admissions by the respondent, and of a verbal admission by the co-respondent. The Court being satisfied, from the circumstances under which these admissions were made, and the conduct of the respondent at the time when they were made and subsequently, that they were genuine, and that there was no reason-

able ground to suspect collusion, pronounced a decree nisi, with costs against the co-respondent. *Williams v. Williams and Padfield*, P. & D., p. 29. The parties in this case were married in July, 1856. A few years after, they went to live at Chantry in Somerset, where the petitioner held the situation of organist of the church, and taught music; their house was opposite the house occupied by the family of the co-respondent, who was a farmer; and the two families became intimate and visited at each other's houses. On the 9th of July, 1863, Mrs. Padfield, who suspected that her son George was carrying on an improper intercourse with Mrs. Williams, taxed him with it, and he did not deny it. She then sent for Mrs. Williams, and taxed her with it: Mrs. Williams confessed it, and fell on her knees, and asked that it might be concealed from her husband. Mrs. Padfield said she should tell Mr. Williams, and Mrs. Williams then went back to her house, packed up her things, and went away by the railway, before her husband returned from business, to her mother at Southampton. When Mr. Williams returned home, Mrs. Padfield communicated to him what had taken place. On the following day, the 10th of July, Mrs. Williams wrote to her husband a repentant letter, and in that and in several other letters, which were put in evidence, she begged to be forgiven, and plainly acknowledged her guilt. There was no evidence of adultery except these confessions. The Judge Ordinary observed: "In each case the question will be whether all reasonable ground for suspicion of collusion is removed. I think that all reasonable ground for suspicion is removed in this case."

Nullity—Malformation of Woman—Refusal to submit to examination.—The respondent, in a suit for nullity by the man, on the ground of malformation, had not been personally served with the citation, and had never submitted to a medical examination, and could not be found, but was supposed to be out of the jurisdiction. No evidence could therefore be given that she was suffering from incurable malformation. The Court suspended its decree, in order to give the petitioner an opportunity of having her examined

if she should hereafter be found within the jurisdiction. *T. v. M., P. M. & D.*, p. 31. The Judge Ordinary said: "This petition was filed by a husband for the purpose of having his marriage with the respondent declared null and void, on the ground of the incurable malformation of the wife, and the petitioner and some medical men were examined in support of the allegations in the petition. It appears that the marriage took place on the 11th August, 1864, that the parties lived together for about six weeks, and that at the end of that time the wife, under pretence of a temporary visit, left the husband's home in concert with her elder brother, and went with him to the continent, in order to avoid the petitioner. The consequence was, that the petitioner was unable to obtain what is invariably required in these cases, namely, a medical inspection of the respondent; and he has been placed in a difficulty as to proving his case, if it was capable of proof. But the Court must look at the evidence before it, and if that evidence is not sufficient to establish the proposition that the wife is the subject of incurable malformation, precluding consummation of the marriage, it cannot grant a decree. Now the evidence of the petitioner by no means satisfies the Court of that fact, and the evidence of the two medical men who attended the respondent, but neither of whom had examined her person, rather pointed to a complaint of a very different character, and in its nature curable. On that evidence the Court cannot grant a decree, but it will, as it has done in a former case, suspend its decree if the petitioner desires it, with the view of having the respondent examined, if she should come to this country, as such an examination alone can satisfy the Court that a decree ought to be pronounced. If the petitioner is not satisfied with this judgment, but desires an opportunity of appealing from it, the Court will at once dismiss the petition."

Alimony—Examination of Husband.—A husband, who had filed no answer to his wife's petition for alimony, was subpoenaed by her to attend at the hearing, and to be examined in support of the petition. He did not answer to his subpoena, and on the service being

proved, the Court made an order that he should attend on the next motion day, and that an attachment should issue in the event of his non-attendance. *Jennings v. Jennings*, *P. M. & D.*, p. 35.

ADMIRALTY AND ECCLESIASTICAL.

Wages—Illegality—Breach of Blockade.

—By principle, authority, and usage, it is not a municipal offence, by the law of nations, for a neutral to carry on trade with a blockaded port. In a suit for wages, upon an agreement entered into for the purpose of breaking the blockade of the Confederate States of America, an article in the defendants' answer, alleging such agreement to be contrary to law, ordered to be struck out. *The Helen*, *A. & E.* p. 1. Dr. Lushington, who rendered the judgment, referred to a decision of Lord Westbury, whilst he was Lord Chancellor, laying down that a contract of partnership in blockade-running is not contrary to the municipal law of England. He also cited a judgment of Chief Justice Parsons, in which the law is stated as follows: "It is agreed by every civilized state that, if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the law of nations, that the neutral shipper of goods contraband of war is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country." Dr. Lushington concluded by saying: "I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations."

Bottomry Bond.—Transactions between the owner and mortgagee of the vessel, which might render the voyage illegal, cannot invalidate a bottomry bond given by the master to a *bona fide* lender, who has only to look to the facts that the ship is in distress, that the master has no credit, and that the money is required for necessary purposes. *The Mary Ann*, *A. & E.* p. 13.

CHANCERY APPEAL CASES.

Succession Duty—Foreign Domicile.—Succession duty is not payable on legacies given by the will of a person domiciled in a foreign country. *Wallace v. Attorney General. Jeyes v. Shadwell.* Law Rep. Ch. Ap. 1.

Vendor and Purchaser—Sale—Conditions of Sale—Puffers.—Property was put up for sale by auction, the conditions stating that the highest bidder was to be the purchaser, and not saying anything as to bidding on behalf of the vendors. An agent of the vendors bid £2,500, the auctioneer then bid £2,600, and the agent and the auctioneer continued bidding against each other, till the biddings reached £3,600. The defendant then bid £3,650, and the property was knocked down to him:—

Held, reversing the decision appealed from, that the vendors could not enforce the contract.

Quære whether the rule allowing one puffer is good. *Mortimer v. Bell*, Ch. Ap. 10. From the evidence in the cause it appeared that what took place at the sale was as follows:—The vendors instructed the auctioneer to put up the property for sale, but not to let it go under £4,000. The auctioneers, very eminent men in their line of business, employed a person named *Webb* to bid, which the member of the firm who acted at the sale stated in his evidence to be the universal practice, unless a sale was to be without reserve. *Webb*, by the direction of the auctioneer, started the biddings at £2,500. The auctioneer then bid against *Webb*, and so on, until the biddings reached £3600. The defendant then bid £3650. The auctioneer then, by the direction of one of the vendors, who was present, ceased to bid, and the property was knocked down to the defendant at £3,650. From the first bidding of £2,500, the biddings had advanced by £100 each time, *Webb* and the auctioneer bidding alternately, so that there had been eleven fictitious biddings, that of the defendant being the only real one. The purchaser insisting that the sale was fraudulent, and refusing to complete, the vendors filed a bill for specific performance, and the purchaser brought an action to recover his deposit. Lord Cranworth, L. C., observed: "The conditions of sale in this case contained the usual provision that the highest bidder

should be the purchaser. Courts of law have held that such a condition prevents the vendor from interposing any reservation—that he has, by that condition, agreed that whoever offers the highest price shall have the property. A bidding by the vendor, or his agent, is, it is said, no bidding, and so there is a contract that the highest bidder other than the vendor shall be the purchaser. It is not disputed that the vendor may stipulate for the power of buying in the property, if it is going at a sum below what he considers a fair price. But in the absence of such stipulation, courts of law hold, that it is a fraud in a vendor to interpose any bidder to prevent the property from going to the person who offers the highest price. . . . Here there were in effect two

persons (*Webb* and the auctioneer) bidding for the vendors. The whole sale, up to the bidding of £3,600, was a mere fiction. . . . I can find neither principle nor authority for holding that in such a case a vendor who, by this misrepresentation, has induced a third person to bid, can enforce his contract." [The Lord Chancellor even doubted whether a sale would be valid, if there were only one fictitious bidder, or *puffer*, unless it were stipulated that the property would not be sold under a fixed price. If this doctrine were enforced in Canada, a good many sales at auction would be null.]

Ancient Lights—Injury.—The owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be restrained.

CRANWORTH, L. C., observed: "Even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence unless he had shown that for whatever purpose the plaintiff might wish to employ the light, there would be no material interference with it." (The local custom in London permitting the owner of a house to raise it to any height he might think fit, was abolished by 2 and 3 Wm. IV. c. 71, and the Lord Chancellor feared that serious inconvenience would ensue.) *Yates v. Jack*, Ch. Ap. 295.

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THE JUDGE OF THE OTTAWA DISTRICT.

We had barely time in our last impression to allude to certain charges of a grave character urged against Mr. Justice LAFONTAINE in the House of Assembly by Mr. WRIGHT, the member for Ottawa County. Since that time we have received what appears to be a revised version of Mr. WRIGHT's speech printed in the *Ottawa Citizen* of August 1st, and also a copy of the petition, published in the same paper of August 10th. We confess that the charges contained in these papers are so serious that it is with some hesitation we reproduce them, unaccompanied by a word of explanation from the judge attacked. This hesitation, however, is diminished by observing that the petition bears date more than two years back, and does not appear to have called forth any reply from the judge during all that time.

The matter came before the House on the 25th of July, when Mr. WRIGHT moved: "That the entry in the Journals of this House, on Friday, the 17th March, 1865, relative to the petition of Mr. Aylen and others, of the District of Ottawa, praying for an investigation into the conduct and acts of the hon. Aimé Lafontaine, Judge of the Superior Court in and for the said District, be now read."

Mr. WRIGHT said: "When it becomes necessary to arraign before the High Court of Parliament one who from the very nature of his office, should be above suspicion, I cannot but ask, in the performance of a most painful duty, for the indulgence of this House. It is within the knowledge of the House that a number of petitions have been presented to it, praying for an investigation of the official conduct of Mr. Justice Lafontaine, and preferring charges of the most serious character against him. These petitions have been signed by a large majority of the gentlemen practising at the Bar of the District, who stake their personal and professional reputations on being able to prove the truth of their allegations. They have been signed by a number of

respectable and influential gentlemen residing in the County which I have the honor to represent, and, as they state, with a full knowledge of the facts. The charges contained in these petitions are clear, precise, and unequivocal, and it is due, both to Mr. Justice Lafontaine and to the petitioners, that these charges should receive the most careful examination. If they can be substantiated, then is Mr. Justice Lafontaine unworthy to sit any longer on the Judicial Bench. If, on the contrary, they can be proved to be false and calumnious, then on the heads of the petitioners must lie the infamy.

"It is alleged that Mr. Justice Lafontaine, before his elevation to the bench, and while acting in the capacity of Agent for the sale of Crown Lands, embezzled large sums of the public money, and that in consequence many persons have incurred serious losses, and all confidence in his integrity, and in his administration of justice has been destroyed. It may be said that this House cannot take cognizance of offences committed before his elevation to the bench. But it should be remembered, that if the statements of the petitioners can be substantiated, the evil which he did as Crown Lands Agent lives after him as Judge, not only in the serious losses incurred by individuals, but in destroying public confidence in the administration of justice, in trailing the honor of the Judiciary in the dust, and in teaching men to despise and hate those things which they should most reverence and honor. It may be necessary to explain this more fully to the House. Mr. Justice Lafontaine officiated for many years as Agent for the sale of Crown Lands, before his elevation to his present distinguished position as Judge of the Superior Court of Lower Canada. He had almost perfect and entire control of the sale of Crown Lands in Hull, Eardley, Wakefield and many other Townships. Practically his theory as to the best mode of managing the Crown Lands, was, that when sales were made the Agent should pocket the amount. I hold in my hand a statement signed by A. Russell, Esq., of the Crown Lands Department, which proves this to be the case. In almost any other country, a different result would have followed from the practical working out

of a theory which, however much it may benefit the individual, is supposed to be opposed to the interest of the great masses of society. In England the other day, when the highest legal functionary in the realm was supposed in some slight degree to have sullied the brightness of his escutcheon—he was forced by the pressure of public opinion to resign. Well, this agent for the sale of Crown Lands was active to a certain extent in his vocation, for he disposed of large portions of the Crown Domain, but as he forgot to return the monies, and neglected in many cases to make returns of any kind, it so fell out—it is alleged—that his successor disposed of some of these lots to other parties, so that the original purchasers were defrauded not only of their money but of the land. These men are possessed by a not unreasonable curiosity to understand how it came about that they were thus defrauded. They know the man who has despoiled them, but they do not see him in what they conceive to be his proper position. They do not see him clad with the variegated garb of the out-laws of society, but clothed in the judicial ermine. He smiles upon them blandly from the bench: These men are placed in a singularly cruel position. They cannot appeal to the courts of law, for the man whom they would arraign sits in the judgment seat, and therefore it is that, having no other recourse, they appeal to the justice of this House.

“Apart from the sins of omission and commission with which Judge Lafontaine has been charged with being guilty, there is the fact, which is notorious, of his utter incompetency. So patent are his deficiencies, that Judge Lafontaine and his decisions have become a mockery and a byword throughout the whole length and breadth of the district of Ottawa. That district is somewhat peculiarly situated. Owing to its configuration and to its peculiar resources and trade, there is induced within its borders a class of active, adventurous, enterprising, but at all times reckless men, who sometimes require to be restrained by the strong arm of the law. Under these circumstances a judge should take the lead in making the laws understood and respected. He should be a man of energy and firmness of

character; one whose decisions would be received with respect, and whose personal character would inspire confidence. Such a judge, in such a district, would be of incalculable benefit to the country. Unfortunately, we have a man who is the very reverse of this ideal. Timid in his instincts, indolent in his habits, knowing that he is an object of contempt and derision, and conscious that he is deserving of the last measure of contempt, he plods doggedly on, biding his time, and awaiting that avenging Nemesis which sooner or later is sure to overtake him. His decisions are a mixture of the grotesque and the horrible. I was present at one trial for murder, presided over by Mr. Justice Lafontaine, and I trust that I may never again witness such a scene. The prisoner was a miserable cripple—one, unfortunately, whose antecedents did not weigh in his favor when the balance for life and death came to be struck. The offence had been committed only a few days before the trial, and the popular mind was consequently strongly excited against the unhappy man. Repulsive in appearance—ignorant almost to idiocy—he was one to whom, from his very helplessness, the utmost impartiality should have been manifested. Against him was arrayed one of the most brilliant orators and accomplished lawyers in the country. The counsel for the defence, although they did all in their power, and I am satisfied did all that men could do to save the life of the unhappy man, yet labored under singular disadvantages. The Court House was filled by an excited crowd strongly prejudiced against the prisoner. It was evident to every intelligent observer that the man was surely doomed—that one man only stood between the unhappy prisoner and eternity, and that man was the presiding judge. A clear analysis of the evidence—a calm exposition of the facts of the case—a charge such as we have a right to expect from a British judge in a British colony, might have saved the life of the unhappy man. I never shall forget the thrill of horror and disgust which ran through my heart when that charge was actually delivered. The last plank was struck away; the man was as surely doomed as though the last office of the law had been performed. It must be

evident that it is time a change should take place, that if the allegations contained in the petitions are correct, this man is neither morally nor intellectually qualified to perform the duties of an office which requires such a union of rare qualities to enable its occupant to discharge those duties properly; that the interests and personal safety of 60,000 of Her Majesty's lieges are of too much importance to be entrusted to one so evidently unworthy of the trust; that the interests of humanity and of all classes of society demand that the charges contained in this petition should receive the most thorough investigation; and, if they can be sustained, that this man should be deprived of his office."

The petition to which Mr. WRIGHT alluded bears date, District of Ottawa, 14th June, 1864, and sets out that "the conduct of the Hon. A. Lafontaine, in connection with the Crown Lands, and the administration of justice in the District of Ottawa, has been characterized for years by such gross neglect of his duties, by such dishonesty and corrupt practices, as have destroyed all confidence in his integrity and efficiency as a Judge, and seriously impaired the public confidence in the Courts over which it is his duty to preside." The petitioners had long abstained from denouncing his conduct in this respect, "in the hope that those whose peculiar duty it is to watch over the administration of justice would take cognizance thereof," and it was only "by the last excess of disorder, and when the administration of justice has in many cases been entirely stopped by the conduct of the said Aimé Lafontaine, and by the loss and absence of the records and registers of the Courts of Justice through his neglect," that the petitioners had been moved to pray the House to do justice in the premises.

The petition proceeds as follows:—

"In this behalf your Petitioners would premise that the Hon. A. Lafontaine, before he was raised to a seat in the Superior Court, held the following offices in the District of Ottawa:—1st. Land Agent for the sale of lots in several of the largest Townships in the district. 2nd. Prothonotary of the Superior Court. 3rd. Clerk of the three Circuit Courts at Aylmer, Lochaber and Portage du Fort.

4th. Clerk of the Crown, and 5th. Clerk of the Peace.

"As Agent for the sale of Crown Lands, the Hon. A. Lafontaine received for many years from purchasers of Crown Lands large sums of money, which he never returned to the Government, but which he embezzled and appropriated to his own use, concealing throughout the receipt of such monies by false and fraudulent returns.

"Your Petitioners would further represent that the monies appropriated as aforesaid by the said Hon. A. Lafontaine amount to a very large sum of money; and his defalcations were for the most part discovered after his elevation to the Bench, as follows: His successor in office offered for sale all the lots that had not been returned as sold by the Hon. A. Lafontaine in his agency up to the time he was appointed judge; and thereupon the parties who had purchased from the said Aimé Lafontaine produced receipts, signed by him, to the said Crown Land Agent.

"Your Petitioners would further represent that the proof of the foregoing allegations is to be found in the Crown Land Department in the receipts, returns, letters and representations of the said Hon. A. Lafontaine, as well as in the testimony of many of the undersigned who have suffered by his said appropriations; and that without having access to the said documents in the Crown Land Department, or a return thereof, it would be impossible to state the date and the amount of each sum paid and embezzled as aforesaid, or the fraudulent means adopted by him to conceal the payment thereof. *It is, however, understood that as each successive act of embezzlement is discovered, the amount is deducted from the salary of the said Hon. Aimé Lafontaine as Judge of the Superior Court.*

"As prothonotary of the Superior Court, the said Aimé Lafontaine so grossly neglected his duties that for several years after he became judge, no register of the orders and judgments of the said court for the time he held that office was to be found in the possession of his successor; and your petitioners aver, that the register which he produced so late as the 18th of November, 1863, was made up by the said Aimé Lafontaine at his private

residence after he became judge, for the purpose of concealing his neglect and mismanagement when prothonotary, and was so made false and incorrect, in order the better to attain that object, and to avoid the legal responsibility attaching to him in favor of parties aggrieved by his neglect of duty as prothonotary.

"As Clerk of the Circuit Court, the said hon. Aimé Lafontaine so neglected his duties that, up to this day, of several hundred judgments rendered therein during the time he was Clerk thereof, there is not and there never has been any register whatever in the hands of his successor. Whether or not the said Aimé Lafontaine has any such registers, your petitioners cannot affirm. If he has them he is guilty of a criminal and illegal act in keeping them. If he has them not, then he never kept any, and, as a consequence, the interest of parties to the judgments of the said court has been most culpably sacrificed by his neglect. But if he keeps them at his domicile for the purpose of making entries in them without the knowledge or consent of their legal custodian, to conceal his neglect and misconduct and thereby to escape legal responsibility towards those who are interested in the said judgments, then is he guilty of a crime of the highest nature. In any case, parties, who years ago were suitors and obtained judgments in that court, cannot execute them for the reason that executions might be, as they have already been, opposed upon the ground that there are no judgments in the court against them upon which executions could legally issue.

"There are no registers whatever in the office of the present Clerk of the Crown of the judgments, orders, or proceedings of the Court of Queen's Bench for the time the said Hon. A. Lafontaine was Clerk thereof.

"No register whatever exists of the orders, judgments and proceedings of the late Court of General Sessions of the Peace, in the District of Ottawa, for the time the said Hon. A. Lafontaine was Clerk of the Peace. And it is impossible, up to this day, to obtain from the proper officer a copy or certificate of any proceeding of a Criminal Court in the District of Ottawa during the time the said Aimé Lafon-

taine was Clerk of the Crown and Clerk of the Peace,—and this solely through the neglect of the said Aimé Lafontaine to keep registers of the proceedings thereof.

"Your petitioners beg further to represent that the said Aimé Lafontaine has made use of his judicial position in the District of Ottawa to conceal his neglect as Prothonotary, and thereby avoid legal responsibility to those by whom injury has been sustained through his misconduct. As Judge he has no right to hold possession of the registers of the Superior Court, which should be in the possession of their legal custodian, much less has he a right to make entries therein. To do so, for the purpose of escaping responsibility, or to conceal his own neglect, would no doubt be a forgery of the very gravest character. However, your petitioners aver that up to the 18th of November, 1863, the said Aimé Lafontaine kept and retained at his private house the registers of that Court for the time he was Prothonotary; and neither the Prothonotary nor any one interested could have access to them. At last, parties thinking there were no judgments against them, as there were none recorded in Court, began to oppose executions by oppositions, setting forth the fact. Thereupon the said Aimé Lafontaine, as Judge, took from the Prothonotary's Office nearly all the records of the Superior Court, and afterwards as your petitioners have reason to believe, recorded in the register judgments which had no existence there when the executions were taken out, to the prejudice of the said opposants."

The petition proceeds to detail various instances, in which the want of a register gave rise to oppositions, when parties holding judgments attempted to execute them. Here, however, the judge would appear to have acted honestly, for it is stated that he kept these cases *en délibéré* till he had completed the register, and then dismissed the oppositions, and very properly too, for it would seem that they had been filed in the hope that the register of judgments could not be produced—a proceeding very much like that of a tradesman who sues a person for a debt that has been paid, relying on the knowledge that his receipts have been destroyed. In November,

1863, the register was produced by the judge, the only judgment omitted (for which a blank page was left) being a judgment in a case where the record was at the time in the hands of an advocate. The petitioners hence infer that these judgments were only entered up during the twelve months preceding the production of the register, during which time Mr. Lafontaine was acting as judge.

The petition further states that "his neglect of duty, his inefficiency and incapacity have become only more conspicuous since he has been raised to the bench. It might have been expected that, considering the past, he would have laboured to efface its impression by assiduously discharging his duties—that he would, if not intelligently, at least promptly, perform the small amount of business entrusted to him. It is, however, certain that, with less to do than any other judge of the Superior Court, there is hardly a case which he has to determine in which some party does not suffer from his delay in rendering his judgments. (Some instances are here given). In short, such delays have become so provoking and injurious to suitors that the courts of justice over which he presides have become almost totally discredited as means of enforcing legal obligations. The business of the civil courts is almost entirely of a mercantile nature, and by a judge of the most ordinary legal knowledge, the judicial decisions therein could be rendered almost immediately after the hearing of the cases, as has been done when other judges have presided over the same courts. What proves moreover that these delays are merely the result of neglect and gross contempt for the public interest, is the fact that, even after they are incurred, he never or seldom gives the reasons or motives of his judgments. Without appointing a time for their delivery, he generally goes into Court when no one but the Clerk, and perchance one or two individuals are present, and then hands in his judgments, one motive usually answering for those in favor of plaintiffs, and one in like manner for those in favor of defendants.

"Your petitioners would further represent that the Hon. Aimé Lafontaine has important duties, such as the granting of writs of Habeas Corpus, the taking of bail, security, and other

matters of like nature, to perform out of term at his chambers, where he seldom, sometimes not for days, attends; and when he does attend it is only for a few minutes in the morning. Parties who come to Aylmer during business hours after eleven o'clock, if they have business of this nature to transact, must send for him at their expense to his residence at a distance of nearly two miles, to notify him that there is something for him to do. In short he so manages to procrastinate everything by his delays and his absence, that it is almost impossible to transact business in which he has any function to perform.

"As a judge in criminal matters the said Hon. A. Lafontaine is still more inefficient and incapable than in any other position. He is so destitute of any knowledge of criminal law that, when even a most elementary question arises in the course of a trial, he has to go for his books and study it on the bench. In English he is incapable of explaining the most simple case to a jury, so as to be understood. In fact, he does not attempt it. In the case of Laderoute lately convicted and hanged for murder, a case which was complicated by numerous and grave questions of law and fact, his charge to the jury in English and French did not last three minutes. So it is in every case; and it is only repeating what is notorious in the district of Ottawa, that the administration of criminal law therein since he has been a judge has failed in most cases through his inefficiency and incapacity."

Mr. CARTIER objected to Mr. WRIGHT's motion being made without notice. He was, moreover, of opinion that the member for Ottawa had not made out a case, the offences specified being committed before Mr. LAFONTAINE's elevation to the bench, with which the House had nothing to do. If (added Mr. CARTIER) he was guilty of offences whilst Crown Lands Agent, it was the duty of the Crown Lands Department to enquire into the matter. Mr. CAUCHON then embraced the opportunity to extend the charge of incapacity to the bench in general. He said, that when so grave an accusation was made against a judge, if the judge did not think proper to ask for an investigation, it was the duty of the House, in the interest of public morality, to

go into it. There was no one practising law in Lower Canada who would not agree with him in saying, *that a large majority of the judges were incapable* in one way or another. The Lower Canada bench *was in a most lamentable state*, and he hoped, by pressing the matter on the Government, that action would be taken. After some further remarks, the motion was ruled out of order for want of notice.

It is deeply to be regretted that a charge of such magnitude against a judge of the Superior Court should be treated with so much apparent levity. The character of the whole bench suffers by these accusations against one whom his colleagues are in courtesy still bound to style their brother, and who continues to receive the title of *honourable*. We do not know how far Mr. LAFONTAINE's delinquencies may have been magnified by personal animosity, but that there is too much truth in the charges is testified by the following, from the *Montreal Gazette*, Aug. 10: "A return, signed by the Assistant Commissioner of Crown Lands, shows that Judge LAFONTAINE is a *defaulter*, in his late capacity as a Crown Land Agent, to the amount of \$6,413 92."

It may be true that the charges against Judge LAFONTAINE, in his judicial capacity, are to some extent vague and general, but that does not alter the intolerable fact, that the administration of justice in an important district is in the hands of a *defaulter*, from whose decisions, in a large class of cases, there can be no appeal.

Contrast with this painful state of things the disinterestedness apparent in the two following paragraphs from the *London Times* of July, sent to us by a correspondent:

"As Chief Baron Kelly has been for a long period of his career associated with Suffolk, some of the leading inhabitants of Ipswich proposed to give his Lordship a public welcome on his entrance into the town next week as one of the Judges of Assize on the Norfolk Circuit. On Thursday, however, a letter was received from the Chief Baron to the effect that, after consulting with his colleague on the circuit (Chief Justice Erle), he considers that it is the duty of Her Majesty's Judges to avoid, where it is possible, even the semblance of a desire to seek or to accept any public mark

of popular favour while engaged in the exercise of their judicial functions. At the same time, the Chief Baron desires that his sincere thanks may be conveyed to such of his friends in town and country as had proposed to confer upon him this public mark of respect." "Mr. Napier has declined to accept the office of Lord Justice of Appeal in Ireland, and for reasons which do him the highest honour. If we are rightly informed, a letter from Mr. Napier will be read in the House of Commons this evening, in which, while expressing his own opinion and that of many friends that his infirmity is not such as to disable him from the discharge of duties which consist almost exclusively in the examination of written documents, he declares that he is unwilling his appointment should afford the slightest ground for a suspicion that justice will not be adequately administered, and accordingly declines the high office which Lord Derby had offered for his acceptance."

It is by such acts of watchfulness, and conscientiousness, that the English Bench has secured to itself the respect of the people.

FACILITIES FOR RENDERING JUDGMENTS.

It is well known that for several years the business of the Court of Queen's Bench, sitting in Appeal, has been greatly impeded by the necessity of having a majority concurring in the judgment present at the rendering of it. Re-hearings have frequently been ordered, sometimes in consequence of the death of one of the members of the Court, and at other times owing to a judge having obtained leave of absence. Almost every term, moreover, a number of cases are retained *en délibéré* for three months longer, merely because one of the majority is absent. Last term, for instance, it was intimated that the Court was prepared to dispose of every case before it, but for the unavoidable absence of one of the judges. It was suggested at the time that a measure enabling an absent judge to transmit his decision in writing, such written opinion to have the same effect as though he were present and pronounced it, would be highly desirable. A bill, with this object in view,

was accordingly introduced by Mr. CARTIER, and has received the sanction of the Legislature. The act also provides that a judgment of the Court of Review may be rendered by a single judge. We give the text below.

CAP. XXVI. An Act to facilitate the rendering of judgments in the Court of Queen's Bench and Superior Court for Lower Canada.

[Assented to 15th Aug. 1866.]

Whereas it is expedient to facilitate the rendering of judgments in the Superior Court and Court of Queen's Bench in Lower Canada, in the cases hereinafter mentioned: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. No change in the personal composition of the Superior Court or of the Court of Queen's Bench, by the appointment of any Chief Justice, Puisné Judge, or Assistant Judge thereof, or the death, resignation or removal to another Court of any Chief Justice, Puisné Judge or Assistant Judge thereof, shall be held to make it necessary that any cause which had theretofore been heard in review, or in error or appeal, should be reheard merely in consequence of such change, provided there be a sufficient number of judges who have heard the cause to give judgment therein.

2. Whenever any cause in the Superior Court, either in the first instance or in review, or any cause in appeal or error in the Court of Queen's Bench, has been heard by any Judge or Assistant Judge either alone or with other Judges, and before the rendering of the judgment founded on such hearing, such Judge or Assistant Judge is removed to another Court, or is appointed Chief Justice, or a Judge of the same or of another Court, or obtains leave of absence, such Judge, or Assistant Judge, may nevertheless sit in judgment in such cause as a Judge of the Court, and either alone or with other judges as the case may be, as if no such event had happened.

3. Whenever any cause in appeal or error has been heard by all the Judges or by a

quorum of the said Court of Queen's Bench, and at least three of the Judges who heard the same are present in Court, and ready to proceed to judgment in the cause, then if any Judge who heard the cause, and would have been competent to sit in judgment therein, be prevented by sickness or other cause from being present, but has addressed a letter to the clerk or deputy clerk of the Court, containing his decision in the cause, agreeing in or dissenting from the judgment of the majority of the Court, and signed by him, or has or had, in testimony of his concurrence therein, signed a written decision drawn up to be delivered and delivered by any other Judge or Judges, such Judge shall be reckoned as if present for the purpose of rendering judgment in the cause, and the decision so transmitted or signed by him shall be of the same effect as if delivered or concurred in by him in Court; and such decision may be so transmitted or signed by a Judge who has been removed to another Court, and who would be competent to sit and give the decision in person, under section two.

4. Whenever any cause in the Superior or Circuit Court has been heard in review by three Judges of the Superior Court, and at least one of the Judges who heard the same, is present in Court and ready to proceed to judgment in the cause, then if any Judge who heard the cause and would be competent to sit in judgment therein, be prevented by removal to another Court, sickness or other cause from being present, but has addressed a letter to the Prothonotary of the said Court, containing his decision in the cause signed by him, or has or had in testimony of his concurrence therein, signed a written decision drawn up to be delivered and delivered by a Judge so present, such Judge shall be reckoned as present for the purpose of rendering judgment in the cause, and the decision so transmitted or signed by him shall be of the same effect as if delivered or concurred in by him; and such decision may be so transmitted or signed by a Judge who has resigned or been removed to another Court, and who would have been competent to sit and give his decision in person under section two.

5. The foregoing provisions shall apply as well to interlocutory as to final judgments.

6. Nothing in this Act shall prevent the Court from ordering a rehearing in any cause if notwithstanding the provisions herein made, they deem such rehearing requisite.

7. The word "Judge" in this Act includes the Chief Justice, or Assistant Judge of the Court, unless the context requires a different construction.

A PRISONER IN THE HOUSE OF ASSEMBLY.

We are accustomed to hear of honourable members being taken into custody by the Serjeant-at-Arms, but the arrest of a stranger within the precincts of the Legislative buildings is of such rare occurrence, that we may be excused for noticing the facts of the case at some length.

On the evening of the 31st July, during a debate, Mr. HOLTON rose in his place, and stated that a grave assault had been committed within the last four minutes upon the person of a member of the House, Mr. J. B. E. DORION, the member for Drummond and Arthabaska, by Mr. *Elzéar Gérin Lajoie*. After some discussion respecting the proper course to be adopted, it was decided that the statement of the member assaulted should be heard before the Speaker issued his warrant.

Mr. DORION then made the following statement:—"I had occasion to go to the library about three quarters of an hour ago (half past 10, P. M.) I was taking some books from the library when I was called on by Mr. *Elzéar Gérin Lajoie*, editor of *Le Canada*, published in Ottawa, who requested me to take a seat which he had just occupied in a corner of the library. I refused to take the seat he had just occupied, but sat down on a stool which was next to him. He commenced a series of questions about an article which appeared in *Le Défricheur*, of which I am the proprietor. After a few words of explanation with regard to the article which appeared in that paper, he became very much excited, and used very abusive language towards me. I cannot exactly recollect the words. They were very impertinent and insulting. As I did not wish to carry on conversation of that description, I rose up from my seat to leave

him alone, whereupon he began an attack upon me, by striking me in the face with his closed hand. I protected myself as well as I could. He struck me several times with his closed hand in the face and on the head, until some of the parties who were in the room, took him away, and prevented him from doing me any further injury."

After this statement, the Attorney General West, and other members, stated that the Speaker had a perfect right to issue his warrant immediately. Mr. CAUCHON, however, maintained that in similar cases previously, the matter had been discussed in the House before making the arrest. On motion of Mr. Attorney General MACDONALD, it was then ordered, that Mr. Speaker do issue his warrant to the Serjeant-at-Arms, authorizing and requiring him to take into his custody, *Elzéar Gérin Lajoie*, for the assault committed by him upon the Honorable Member for Drummond and Arthabaska, and bring him to the bar of this House forthwith.

The Speaker then issued his warrant, and the arrest was made forthwith, whilst the proceedings of the House were continued, Mr. Lajoie being at the time seated in the reporters' gallery. On the following day, the Serjeant-at-Arms reported to the House, that in obedience to the Speaker's warrant, he had taken Mr. Gérin Lajoie into custody. The prisoner was then called in, and the complaint read to him by the Clerk, whereupon Mr. LAJOIE made the following statement:—

"Feeling myself grossly insulted by an article published in *Le Défricheur*, a newspaper edited by the Honorable Member for Drummond and Arthabaska, I was desirous of meeting with him in order that I might ask him for explanations upon the subject. I was yesterday evening in the library engaged in making some researches, when I saw the Honorable Member a few paces distant from me. I arose from the seat of the Assistant Librarian where I was working, and asked the Honorable Member for Drummond and Arthabaska if I might say a few words to him. He came towards the seat which I was occupying, and I offered him that seat; he preferred to seat himself on the stool beside it. I then asked what reason he considered himself to have for

insulting me in his newspaper in so odious a manner. I caused him to observe that his attack was directed against actions in my private life, a course which I had never allowed myself to adopt in respect of him. He told me that there was a misunderstanding; that if I had not attacked him in his private life, and he acknowledged that I had not attacked him in his private life, I had treated him very unjustly in respect of his actions in his public life. I replied to him that if I had attacked his public life, if I had judged them more or less severely, it amounted to a matter of opinion. He quoted to me a fact lately published in *Le Canada* which he pretended was false, and which I would not retract. I pointed out to him that that fact had been affirmed by a newspaper published in the vicinity of the place where he resided, and that I was waiting until the discussion between them was concluded to know what ground I should take. The Honorable Member for Drummond and Arthabaska then told me that he had not seen the assertion which I mentioned to him. The conversation continued for some time, the Honorable Member acknowledging that he had attacked me in my private life and asserting that he did not regret it. I then became somewhat excited and told him that the article published in his paper was the work of a spy. He then appeared rather nervous. I then told him that I did not know whether or not he was the author, but that my words were intended to apply to the person who had written the article. I gave him to understand very plainly, how mean a thing it was to act the spy towards an adversary, or to cause him to be watched with the view of making public his most private acts. I made use of the word "spy" several times. The Honorable Member then said, "As you seem inclined to make use of language of that kind, I will withdraw." I replied immediately, "I repeat that you are a spy, and a deliberate liar." The Honorable Member then turning towards me, struck me in the face with a book which he held in his hand. I returned the blow and gave him several blows with my fists; the Honorable member also struck me several times with his hands, he even tried to kick me. In the meantime several persons came

forward and interposed between us. I believe that one of these persons was a member of Parliament. I again took possession of the seat on which I had been working, thereupon the Honorable Member told me to leave the library. I told him that I would not go out as I had a right to remain and would remain there. He then told me he would have me arrested. Thereupon I expressly stated, "at all events, Mr. Dorion, I assert that you struck me first." I did not catch his reply, but I have since been told that after a moment's hesitation he said "No." There were several persons present when I used the words last mentioned. I have nothing more to add on this subject, but with the permission of the House, I would venture to complain of the treatment I received after I was taken into custody. Last night whilst I was at the bar a group of persons collected at a few paces from where I was standing, and a person, one of the group, a Member of the House, turned towards me, and threatened me, brandishing his arms and making use of exclamations unknown to the human species. I deemed myself deeply insulted by this proceeding, and have craved permission to make it known to the House."

Mr. J. B. E. DORION then made the following statement, in reference to the foregoing statement of the prisoner:—

"I wish to add to my declaration of yesterday, or in answer to the statement made by the prisoner, that I never struck him first, that I had no book in my hand at the time, that I never heard him say that I had struck him first, and that if he made such a statement I did not hear it, nor did I give it any answer. I never acknowledged that I had attacked him in his private life, and I positively state that I was in the act of leaving him when he assaulted me."

Some discussion ensued respecting what the prisoner had stated as to the use of "exclamations unknown to the human race." It appears that this referred to a remark of Mr. STIRTON, that he would choke anybody who would speak to him as the prisoner had spoken to Mr. DORION.

The question then was as to the punishment to be meted out to the offender. We extract

the following from the *Votes and Proceedings* of the House:—

"On motion of Honorable Mr. Attorney General *Macdonald*, it was *Resolved*, That *Elzéar Gérin Lajoie* is guilty of a breach of the privileges of this House.

Honorable Mr. Attorney General *Macdonald* moved, that the said *Elzéar Gérin Lajoie* be called to the bar of the House, and there reprimanded by Mr. Speaker for the said breach of privilege, and be committed to the custody of the Serjeant-at-Arms for twenty-four hours.

Honorable Mr. *Macdonald* (Cornwall) moved in amendment, that the words "custody of the Serjeant-at-Arms for twenty-four hours" be left out, and the words "the Gaol of the County of Carleton for the remainder of this session" be inserted in lieu thereof.

Mr. *Haultain* moved in amendment to the said proposed amendment, that all the words after "committed," in the said amendment, be left out, and the following words substituted instead thereof, "to the custody of the Serjeant-at-Arms during the pleasure of the House;" which was agreed to on the following division:—*Yeas*, 75; *Nays*, 25.

Honorable Mr. *Macdonald's* (Cornwall) proposed amendment, as amended, was then agreed to on a division, and the main motion, as amended, agreed to.

Mr. *Elzéar Gérin Lajoie* was then called in, and addressed by Mr. Speaker, as follows:—

"It is a power incidental to the constitution of this House to preserve peace and order within its precincts, and protect the members of it from insults and assault. This power is necessary not only to insure the freedom of action of members, but that freedom of discussion which is one of their fundamental rights.

You, *Elzéar Gérin Lajoie*, pretending a cause of complaint against a member of this House, sought him out and came within the precincts of this building, and within a part thereof, to which you are entitled to resort, not by right but by favour only, grossly insulted that Hon. Member, and concluded by violently assaulting him. For these gross breaches of privilege you have not even thought

it judicious or becoming to offer any apology; you have mistaken your rights and position in reference to Honorable Members and in this building. The place in which this insult was offered and assault committed, greatly aggravates the criminality of your conduct.

Having been found guilty of a breach of the privileges of this House, in having assaulted *Jean Baptiste Eric Dorion*, Esquire, a member thereof, you have rendered yourself liable to such punishment as this House might award—and this House having ordered that you be reprimanded, you are reprimanded accordingly.

The Order of the House directs that you be committed to the custody of the Serjeant-at-Arms, during the pleasure of this House."

The prisoner accordingly remained in the custody of the Serjeant-at-Arms from the 1st of August to the 15th, when the House rose. A handsome suite of apartments was appropriated to his use, and his personal comfort well attended to in other respects. The remuneration of the Serjeant-at-Arms for the custody of a prisoner is said to be \$25 per day.

ACTIONS IN EJECTMENT.

A singular instance of hasty legislation is afforded by 25th Victoria, Chapter 12. According to this, the costs in actions under the Act respecting Lessors and Lessees are to be taxed according to the amount for which judgment is rendered. Now, if a plaintiff brings an action of ejectment, and also claims damages, it would seem that if he recovers \$20 damages, he is only entitled to costs on that amount, though he succeeds in the demand for ejectment. In the same way, if he brings an action in ejectment and also sues for \$20 rent, he will only get costs on \$20 if he succeeds in both demands; but if he brings an action for ejectment only, then he is entitled to costs according to the annual rent. *Vide Noad and Smith* reported in the present number. In this case it was contended by the defendant that inasmuch as the costs are to be taxed according to the amount of the judgment, and the judgment awarded no sum at all, therefore he should either be condemned to pay no costs at all, or at most only costs of

the lowest class. This is all he would have had to pay if he had been condemned to pay one or two months rent, why then should he be subjected to the costs of an action for the whole annual rent, because he happened to have paid up all the rent? There is evidently an inconsistency here, which has not been removed by the Code of Procedure. We are of opinion that the judgment confirmed by the Court of Appeals was the only judgment that could reasonably have been rendered, so far as this point was concerned, but the amending act, 25th Victoria, evidently requires reconsideration.

THE NEW REGISTRATION DUTIES.

By an order in Council, the new tariff of duties imposed under the "Act to provide a fund towards defraying expenses incurred for matters necessary to the efficiency of the Registry Laws," is to come into operation on the 1st of October next. The tariff is the same as published 2 L. C. Law Journal, p. 28, and the duties are, until further orders, to be paid in money, the amount received by every Registrar to be by him accounted for and paid over to the Receiver General immediately after the close of every third month, to be reckoned from the 1st of October next.

LEGAL APPOINTMENTS.

The appointments, already noticed, of Judge MEREDITH as Chief Justice of the Superior Court, and of Judge BADGLEY as a *puisné* judge of the Court of Queen's Bench, have now been officially announced. Mr. Assistant Justice MONK has also been appointed a judge of the Superior Court. The Hon. CHARLES ALLEYN has been named Sheriff of Quebec.

In Upper Canada, Mr. DEACON, of Perth, has been appointed County Judge of the County of Renfrew; Mr. EDWARD HORTON has been appointed Deputy Judge of the County Court for the County of Elgin; and Mr. LAWRENCE LAWRASON, Police Magistrate for the City of London.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH,

APPEAL SIDE.

June 9.

NAUD, (Defendant in the Court below) Appellant; and SMITH, (Plaintiff in the Court below) Respondent.

Ejectment—Costs—25 Vic. c. 12, sec. 1.

Held, that in an action of ejectment, where no rent or damages are sued for, the costs will be taxed according to the amount of the annual rent.

This was an appeal from a judgment rendered by the Court of Review at Montreal (1 L. C. Law Journal, p. 67,) on the 30th of September, 1865, confirming a judgment by *Loranger, J.*, at Sorel. The action was brought by Elizabeth Smith to eject the defendant from premises occupied by him in Sorel, for holding over for more than three days after the expiration of the lease. The plea was to the following effect: that in January, 1865, the defendant asked the plaintiff whether she would renew the lease for another year on the same terms, viz. £36 per annum, and that the plaintiff answered that she would let him remain for £40. The Circuit Court for the District of Richelieu, holding that the defendant had not established his plea, sustained the plaintiff's action, and condemned the defendant to pay full costs. This judgment being inscribed for revision at Montreal, was confirmed in every respect. The defendant appealed from these decisions on the following grounds:

1st. That the judgment of the Circuit Court bore date 14th April, 1865, whereas the action was not instituted till the 4th of May, 1865.

2nd. That by section 4 of chap. 40, C. S. L. C., ejectment actions shall be "instituted in the usual manner in the Superior or Circuit Court; and the annual value or rent shall determine the jurisdiction of the Court." But by the amending act, 25 Vict. cap. 12, sec. 1, "actions under this act shall be instituted in the Superior or Circuit Court, for the amount of rent or damages sued for."

It was hence contended by the defendant that there no longer existed legal dispositions

as to the manner of instituting actions in ejectment only, and as to the jurisdiction of the Court before which they should be brought, when the term of the lease had expired, and when all the rent had been paid. It was further pointed out by the defendant that 25 Vic. cap. 12, sec. 1, states that "the costs shall be allowed and taxed in accordance with the amount for which judgment shall be rendered." Now here the judgment awarded no amount at all, and nevertheless the defendant was condemned to pay full costs of suit. If he had owed a month's rent, \$12, he would only have had to pay costs as of the lowest class, and because he owed no rent he was placed in a much worse position, and condemned to pay costs of an action for \$144.

DUVAL, C. J. The judgment in this case is confirmed.

Meredith, Drummond, and Mondelet, JJ., concurred.

Lafrenaye & Bruneau, for Appellant.
A. Germain, for Respondent.

GIBSON, *et al.*, (plaintiffs *par reprise d'instance* in the Court below) Appellants; MOFFATT, (defendant in the Court below) Respondent; and YOUNG, (Intervening party *par reprise d'instance*) Respondent.

Practice—Declaration on Saisie-Arrêt—Special Answer—Promissory Note.

Egan and *Moffatt* having been in copartnership, under the firm of *William Moffatt & Co.*, and *Egan* having subsequently entered into copartnership with other parties under the firm of *John Egan & Co.*, by an agreement in July 1855, *Moffatt* agreed with *John Egan & Co.*, to assume all the liabilities of *William Moffatt & Co.*, to pay the sum due *Egan & Co.* in four instalments, and to give security, on condition that he should be allowed to cut timber on certain timber limits of *Egan & Co.* He subsequently cut timber without giving security, and the timber was transferred to the firm of *Symes & Co.*, which had made advances to him. *Moffatt* paid *Egan & Co.* the first instalment of the above-mentioned debt by two notes, one for £1500, which *Egan & Co.* paid away to a third party, and one for £800, which *Egan & Co.* placed to the credit of *William Moffatt & Co.* *Egan & Co.*, having, by *saisie-arrêt* before judgment, seized

the timber cut as in the possession of *Moffatt*, and having sued for the whole debt:

Held, that *Egan & Co.*, having paid away the note for £1500 to a third party, could not sue for the debt for which it was given till they produced the note.

2. That *Egan & Co.*, having carried the note for £800 to the credit of *William Moffatt & Co.*, could not withdraw it from that account without the consent of *Moffatt*.

3. That the plaintiffs, not having alleged the insolvency of *Moffatt* in their declaration, could not base a right to sue for the whole of the debt on such insolvency; and that the allegation of his insolvency in their special answer could not avail to supply the deficiency in the declaration.

4. That the right to sue for the whole of the debt could not be based on the alleged fraud of the defendant in transferring the timber to *Symes & Co.*, unless such fraud had been alleged in the declaration, the allegation of fraud in the affidavit alone being insufficient.

The judgment appealed from in this case was rendered by *Lafontaine, J.*, in the Superior Court at Aylmer, on the 16th of December, 1863, dismissing an action together with a *saisie-arrêt* before judgment, by which the plaintiffs *John Egan & Co.*, now represented by the appellants, claimed from *William Moffatt* the sum of £7678 17 8, for which they attached as belonging to, and in the possession of the defendant, 2,500 pieces of red pine timber. The judgment set aside the attachment and maintained the intervention of *George B. Symes & Co.*, (now represented by *Young*, the surviving partner) who had intervened to claim the property of the said timber, as having purchased it from the defendant *William Moffatt*.

The nature of the contestation will be sufficiently explained by the remarks of *Mr. Justice Meredith*.

MEREDITH, J. In order that the observations to be made upon the points in controversy in this cause may be understood, it is necessary to give an outline of the transactions, in which the difficulties now to be adjudicated upon originated.

On the 25th of January, 1851, by a notarial deed, a copartnership was formed between *John Egan*, one of the plaintiffs in this cause, and *John Supple*, under the firm of *John Supple & Co.*, for the manufacturing of timber

on the River Du Moine, a tributary of the Ottawa. Supple and Egan carried on business together, under the said agreement, until the autumn of 1853, when, with the consent of Egan, Supple transferred his interest in the copartnership of Supple & Co., to the defendant William Moffatt. The exact terms upon which Moffatt took the place of Supple do not appear; but that Moffatt did take the place of Supple, and carry on business in connection with John Egan, under the firm of Wm. Moffatt & Co., for nearly two years, is beyond doubt. The respondents strenuously contend that under this copartnership, Moffatt acquired an undivided half of the timber limits on the River Du Moine held in the name of Egan & Co., but such is not the case. All that the copartnership of William Moffatt & Co. had was the right to work upon the limits which belonged to Egan.

On the 13th July, 1855, an agreement was entered into between John Egan & Co. and William Moffatt, by which the latter assumed, upon certain conditions, the whole of the liabilities of the firm of William Moffatt & Co. to John Egan & Co. That agreement is of great importance in the present case, I therefore give it at full length :

" It is hereby mutually agreed between William Moffatt of Pembroke and John Egan & Co. of Aylmer, to the following effect : the said William Moffatt hereby agrees and binds himself to assume all the liabilities against the business of William Moffatt & Co., as traders on the River Du Moine; to pay or cause to be paid to the said John Egan & Co., in four annual instalments, the actual sum due the house up to this period, with the legal interest thereon; and furthermore to relieve John Egan & Co. from all responsibility, whatever there may be, either as to debts or otherwise; the claim of John Egan & Co. being £8,500, or whatever it may be over when the balance is finally settled; and to relieve John Egan & Co. from certain bills which John Supple of Pembroke now holds, which he obtained when selling out his interest in the concern.—It is further understood that as part of the security which is to be given to John Egan & Co. for their claim and interest in the business of William Moffatt & Co., the property of his father,

Alexander Moffatt of Pembroke, is to form part—say to the extent of £4,000, the balance to be covered by some other satisfactory security which may be given at the period when the whole transaction is closed—say in one month from this period. John Egan & Co. will on their part give their interest in the limits connected with the company, as marked on a plan of the River made from actual survey; also the timber and every thing connected with the estate. Thus done and passed at the city of Quebec this 13th day of July, in the year of our Lord, 1855, in presence of the subscribing witnesses."

Sometime after this arrangement had been entered into, namely, on the 8th January, 1856, an agreement was made between Moffatt and G. B. Symes & Co., the intervening parties, by which that firm agreed to advance to Moffatt £5,000 upon a lot of timber then made by Moffatt upon the River Du Moine, and to enable him "to carry on his timber operations, and to get out his timber that winter in the same locality." One of the conditions of the agreement was that the said timber should be consigned and delivered by Moffatt to Symes & Co. at their cove in Quebec, "and deposited with them as a pledge and security, lien, *gage*, for the payment of the said sum of £5,000, with interest and commission as agreed upon; and as further security, Moffatt agreed to transfer his timber limits to Symes & Co. Moffatt, who had failed to give to John Egan & Co. the security to which they were entitled under the agreement of July, 1855, after he had secured a promise of advances from Symes & Co., attempted to induce Egan & Co. to let him have a transfer of the Du Moine limits upon more favourable terms than those mentioned in the agreement of July, 1855; but in this attempt he did not succeed. In the meantime, and notwithstanding his failure to give to Egan & Co. the security to which they were entitled, he continued to manufacture timber on the Du Moine limits with the advances he had obtained from G. B. Symes & Co.

On the 22d January, 1856, as a further security to Symes & Co., Moffatt gave them a bill of sale of the timber which he had then manufactured. This timber was in the course

of the following season taken to Quebec, and delivered to Symes & Co., without any objection on the part of John Egan & Co. When sold it brought much higher prices than mentioned in the bill of sale to Symes & Co.; and Moffatt was credited for the full price, and debited with all the charges upon the timber, thus showing that the object of the bill of sale was to improve the position of Symes & Co. as regarded their security upon the timber. At the end of the business season in 1856, the balance due by Moffatt to Symes & Co. was £7305 7 4, so that the result of the year's business was highly unsatisfactory to all parties. Symes & Co. were largely in advance to Moffatt. The timber limits of Egan had been worked upon for a season without any return to him, and Moffatt found his liabilities greatly increased. Egan & Co. do not appear to have pressed Symes & Co. in any way during the business season of 1856. They probably hoped that the timber made would yield a profit, and that that profit would go to discharge their claim against Moffatt. But when they saw the result of the operations of 1856, they, with reason, became more anxious to secure their claim. Accordingly on the 20th Nov. 1856, they wrote to G. B. Symes & Co. as follows:

Aylmer, 20th Nov. 1856.

Messrs. G. B. Symes & Co., Quebec.

Dear Sirs,—Inclosed we beg to hand you a copy of our agreement with Mr. William Moffatt, which has not been carried out. The limits were worked upon last winter, and are being worked upon this: say the past season about 300,000, and the present about a like quantity. You will at once see the necessity of having this matter arranged previous to having the limits denuded of the timber. Our Mr. Egan is going to England, and is anxious, as before expressed to you, to have something done towards the settlement.

We are, dear Sirs, Your most obedient servants,

John Egan & Co.

On the 11th of December, 1856, Egan & Co. served a notarial protest upon Moffatt, reciting the agreement of the 13th of July, 1855, referring to the manner in which he had cut timber upon the limits of John Egan, without

giving the stipulated security, and declaring "that the occupation of the said limits and the removal of timber therefrom," caused serious loss and damage to the estate of John Egan & Co. When Symes & Co. received the letter of the 20th of November, 1856, the balance due to them by Moffatt exceeded £7,000. and a considerable part of the lumber made with their means was lying in the woods. It was not, therefore, to be expected, and, as I shall hereafter show, it was not desired on the part of Egan & Co., that Symes & Co. should, at that moment, cease to make advances to Moffatt. It appears, however, that in the following month of January, Mr. Young, a member of the firm of Symes & Co., went to Ottawa for the purpose of settling the conflicting claims of Egan & Co. and Symes & Co. upon the property of Moffatt, but the negotiations for that purpose were not successful, the cause of the failure being, it seems to me, a difference of opinion as to the number of limits to be transferred under the agreement of July, 1855. Soon after this, namely, on the 19th January, 1857, Symes & Co. took a bill of sale of the remainder of the timber that had been manufactured by Moffatt in the previous season. A delivery, as to the nature of which it is not necessary here to allude, was made, as well under this bill of sale, as under the bill of sale made in the month of January, 1856. On the 1st of March, 1857, James Connolly received instructions from Symes & Co. to go to the establishment of the defendant at Du Moine River, and take charge of the timber in question. He went up, received what he considered a further delivery of the timber from the defendant, and then, on behalf of Symes & Co., put it in charge of one Robert McLean, who says he remained in charge and possession of it, until it was seized in this cause at the suit of the plaintiffs, the seizure so made being under a writ of *saisie-arrest* before judgment, in an action for £7,678 17 8, the balance of the debt due by William Moffatt & Co. to John Egan & Co., and which William Moffatt undertook to pay by the agreement of the 13th July, 1855. Notwithstanding the seizure thus made, the timber was taken to Quebec, (security having been given in the usual course,)

and the full price at which it was sold, which much exceeded that mentioned in the bill of sale, was carried to the credit of Moffatt, and all the charges upon the timber until the moment it was sold were placed at the debit side of his account, thus showing that the object of the second bill of sale, as well as of the first, was to improve the security of Symes & Co.

The action of the plaintiffs was contested by the defendant Moffatt, and the timber seized was claimed by Symes & Co. on the ground that it was in their possession at the time of the seizure, and that it belonged to them under the agreement for advances and the two bills of sale. The pleadings, as well upon the original demand as upon the intervention of Symes & Co., are exceedingly voluminous, and raise a number of questions that need not be discussed. I, therefore, shall limit myself to the consideration of those points upon the decision of which our judgment must depend. And, in the first place, with reference to the demand of the plaintiff, it is necessary to determine what, according to the declaration, is the cause of action sued upon. The defendant contends that he is sued upon the agreement of the 13th July, 1855; that, according to that agreement, one-fourth only of the debt was due when the action was brought; that that fourth had been paid by two payments, one of £1,500, and the other of £800; and, therefore, that the action must be dismissed. The plaintiffs, on the other hand, contended, in the course of the argument before us, that the action was brought to recover the debt due by William Moffatt & Co., for the whole of which the defendant was liable, irrespective of the agreement, and that the agreement was referred to merely as establishing the amount due by the defendant as a member of the firm of Moffatt & Co. Here it may be well to observe that the question as to whether the defendant was sued under the agreement or not, was one of great interest to him. If sued as a partner in the firm of Moffatt & Co., he had a right to claim indemnity, for one-half of the debt, from his partner John Egan, one of the plaintiffs, whereas, under the agreement, he had assumed the whole of the debt himself; and, therefore, if he was liable under the

agreement, he could *not* make a claim against Egan.

Now, on reference to the declaration, we find that, in the first count, it formally recites the agreement, and that count most assuredly is based upon the agreement. The second count is for goods, wares, and merchandize sold, &c. But the goods and merchandize really sold were not sold to the defendant; they were sold to a firm of which he was a member, and the declaration does not allege any dealings with a firm. The third count is "for a balance which the defendant admitted to be due and promised to pay to the said plaintiff, on the plaintiffs' account rendered on the said last mentioned day to the defendant, as and for divers lumber transactions." Now the agreement certainly does admit a balance, and contains a promise to pay, but it is a promise to pay in four instalments, and that is what the defendant contends for.

That the first count is founded on the agreement is too plain to be disputed; and the defendant could not, by one and the same action, be sued as sole debtor under the agreement, and as joint debtor of the same debt, irrespective of the agreement. Any doubt, however, as to whether the defendant was or was not sued under the agreement, is removed by the factum of the appellants in the Superior Court, in which they say: "The declaration was founded upon the agreement filed by the plaintiffs, dated July 13th, 1855."

Assuming, then, as I think is the case, that the action was brought under the agreement, this brings us to the second of the pretensions of the defendant which I propose to consider, namely, that, under the agreement, there was but one instalment due, and that by two payments, the one by a note of £1,500, and the other by a note of £800, the whole of the first instalment was discharged. As to the note for £1,500, it is admitted it was paid by the defendant to the plaintiffs; that they transferred it to a third party, to whom £1,000, and no more, was paid on account of it. But as the plaintiffs paid the note of £1,500 to a third party, and have not produced it in this cause, they cannot, for the present, nor until they do produce it, sue for the debt on account of which it was given. Then as to the note for £800, the

receipt of it also is admitted, but the plaintiffs contend it was imputed on a debt due by Moffatt alone, and not on the debt now sued for. The receipt given for the two notes bears date at Quebec, 15th October, 1855, and mentions simply that they were given "on account." It appears by the account marked A, which is an extract from the books of account of the plaintiffs, that the note for £800 was in the first instance placed to the credit not of William Moffatt individually, but of William Moffatt & Co.; the entry being under date 31st August, 1855, when the financial year of Egan & Co. terminated. James Doyle, manager of Mr. Egan's estate, being asked, "How long the said £800 remained credited to Wm. Moffatt & Co's. account, before it was credited to William Moffatt's account," answered: "I state a few days, perhaps a few weeks, for both entries appear in our journal and ledger under date of the 31st August, 1855"; and he added, "Mr. Champion was the clerk who made the entry erroneously in the first place, and it was afterwards altered." Mr. Doyle was the manager of the business at Ottawa, and the note for £800 was received at Quebec, and the entries respecting it were made there, so that Mr. Doyle could not have any personal knowledge of the circumstances under which the entries respecting the note for £800 were made. Under these circumstances, it would have been well to have had the evidence of Mr. Champion, or of some other person having a personal knowledge of the circumstances to which Mr. Doyle refers. All that we know is that when the note was received by John Egan & Co., it was entered in their books to the credit of William Moffatt & Co.; that it remained at their credit, as Mr. Doyle says, "a few days, perhaps a few weeks;" that then, so far as we know, without the consent of Moffatt & Co. having been obtained, or even asked, a sum equal to the amount of the note was placed to the debit side of the account of William Moffatt & Co. with Egan, thus neutralizing the credit that had been given for the note; and then, that the note was placed to the credit of Wm. Moffatt in the account which he individually had with Egan & Co. But when, for what reason, and on what grounds, this was done, is not proved. The defendant, Moffatt,

had a deep interest in paying the first instalment due upon the agreement of July, 1855; and the fact that he gave Egan & Co. two negotiable notes amounting to £2,300, when their claim against him as an individual, (whatever may have been the nature of it,) did not then amount to £900, shows that he had in view the debt under the agreement of July, 1855. Under these circumstances it seems to me that Egan & Co., having carried the note for £800 to the credit of William Moffatt & Co., could not withdraw it from that account without the consent of Moffatt.

On the part of the plaintiffs, however, it was contended that as Wm. Moffatt & Co. were insolvent when the action was brought, the plaintiffs had a right to sue for the whole of their debt. That Moffatt was insolvent when the present action was brought is beyond doubt; but that he became insolvent after the agreement giving the credit is by no means certain. Indeed, I can see nothing to lead us to think that he had then assets sufficient to meet the claim of Egan & Co. But it is unnecessary to dwell upon this point, inasmuch as the plaintiffs have not alleged the insolvency of Moffatt in their declaration. There is an allegation of his insolvency in the special answer, but if the right of Egan & Co. to sue depends upon the insolvency of Moffatt, that fact ought to have been alleged in the declaration, and the deficiency of the allegations in the declaration respecting the cause of action cannot, in the present case, be supplied by the allegations in the special answer.

It was also contended that the plaintiffs had a right to sue for the whole amount due to them, in consequence of the attempt of the defendant, Moffatt, to fraudulently defeat the plaintiffs' claim by the pretended transfer of all the timber to the intervening parties. Upon this point it is sufficient to observe that the declaration does not charge the defendant with fraud. The appellant answers, that there are allegations of fraud in the affidavit; but that does not suffice. It is to the declaration that the defendant is called to plead, and all the allegations necessary to show that the plaintiffs had a right to sue when and as they did, ought to appear on the face of the decla-

ration. I do not, however, hesitate to say, that in my opinion Moffatt is not chargeable with fraud. His dealings with the intervening parties may, or may not, be legal, but I do not think they were fraudulent.

For these reasons, being as I am of opinion that the action is founded upon the agreement of July, 1855, under which but one instalment was due when the action was brought; and that that instalment was satisfied by the two notes, one for £1,500 and the other for £800, I necessarily come to the conclusion that the judgment of the Court below upon the controversy between the plaintiffs and the defendant ought not to be disturbed.

I now pass to the consideration of the intervention of G. B. Symes & Co. If, as I think, the action of the plaintiffs must be dismissed, then as between the defendant and Symes & Co., I think the evidence unquestionably sufficient to maintain their intervention.* I, therefore, deem it unnecessary to express my opinion upon two very important questions argued before us, the first being as to the effect of the two bills of sale in favour of the intervening parties, and the second, as to whether the intervening parties, at the date of the seizure, had such a possession of the timber as to enable them, as against third parties, to maintain their claim if they are to be deemed pledgees only.

But as, according to my view, the action of the plaintiffs must fail irrespective of the merits, I think it right to observe that although our judgment may rest upon merely technical grounds, yet that I think it meets the justice of the case, in so far as regards the intervention of Symes & Co. After the agreement of the 13th July, 1855, was entered into, it was as necessary for the interest of Egan & Co., as of Moffatt that advances should be made to the latter. Egan & Co. had extensive timber limits. Their debtor Moffatt was possessed of experience as a manufacturer of timber, but neither their timber, nor his business experience, could be turned to account without pecuniary advances. Mr. Egan, it appears from the evidence of Fitzpatrick, introduced Moffatt to Symes & Co., who during

the business season of 1856, made advances to Moffatt upon the usual terms, and, if not with the express consent, at least with the full knowledge of Egan & Co. They were perfectly aware that during the winter of 1855-6, Moffatt was working upon limits held in the name of Mr. Egan, by means of the advances furnished by the intervening party. Egan & Co., without any, even the least, objection on their part, allowed the timber so manufactured, as far as it was got out that season, to be delivered to Symes & Co., in the usual course, and sold by them to meet their advances. Egan & Co. knew that if any profits had been made upon the operations of Moffatt, they would have gone to discharge his debt to them; and it was after it had been ascertained that the business of that season had resulted in a loss, that they appear for the first time, namely, by the letter of the 20th November, 1856, to have in a formal manner drawn the attention of Symes & Co., to the necessity of a settlement being made respecting the debt due by Moffatt to Egan & Co., before Moffatt took any more timber from their limits. Even in that letter they did not express any wish that Symes & Co. should discontinue the making of advances to Moffatt, and when they protested against Moffatt, they did not in express terms require him to discontinue the cutting of timber on their limits, nor did they serve a copy of the protest on Symes & Co. On the contrary, even then, after they had written to Symes & Co., saying that Moffatt had worked upon their limits during the previous year to the extent of about 300,000 feet of timber, they were most anxious that Symes & Co. should not discontinue their advances. The evidence of Mr. Fitzpatrick as to this part of the case is very important. He says that when about the 18th or 20th December, 1856, he spoke of stopping the supplies then being furnished by Symes & Co., Mr. Egan "begged of him in God's name not to do anything rash," and pledged himself "to settle everything," and "make all right" with Mr. Symes in England, adding "if you now stop everything we will be ruined, for you know that just now I am in difficulties myself." It is to be observed that this took place some months after all the timber seized in this cause had been

* As to the contract of pledge between the pledgor and pledgee, vide 2 Pardessus, Droit Com. no. 486.

cut; and that no part of that timber was cut after the date of the first letter which appears to have been written by Egan & Co. to Symes & Co., about the affairs of Moffatt, namely of the 20th November, 1856. It is true that after the date of that letter, Symes & Co. continued to make advances to Moffatt, and received from him the timber seized in this cause; but it was not to be expected, and Egan & Co., as I have already observed, do not appear to have expected that Symes & Co. would have ceased to make advances to Moffatt on their receiving the letter of the 20th November, 1856. At that time, the balance due by Moffatt to Symes exceeded £7000, and a large part of the timber manufactured from the advances of Symes & Co., was then lying in the forest, and there is every reason to believe that if Symes & Co., or some other parties, had not made advances to Moffatt, that timber would have been lost to all concerned. The course pursued by Symes & Co. was to make advances, not for the purpose of having more timber cut upon the limits of Egan, but in order to get out the timber already cut, and the whole of the timber delivered to Symes & Co. by Moffatt as well in the year 1857, as in the year 1856, did not even nearly amount to the quantity mentioned by Egan & Co., in their letter of the 20th November, 1856, as having been manufactured by Moffatt in that year alone. It may be added that as Egan & Co. allowed the timber brought down in 1856, to be delivered to Symes & Co., it is to be presumed that they thought that firm reasonably entitled to that timber; and if they had a just claim to the timber received by them in 1856, they had an equally just claim to the timber received by them in 1857.

That Egan & Co. have been losers by these transactions is plain; for their limits have been worked upon for two years without any advantage to them; but for this Symes & Co. are not to blame. They made advances in the usual course of trade, and upon the security usual in such cases, and they still appear to be unpaid to the extent of above £5,000; and if Egan & Co. had themselves continued to make advances to Moffatt, it seems more than probable that they would have lost, not only the timber which they now lose, but a part of

their advances in addition. The case upon the intervention, according to my view, may be reduced to this: the advances by Symes & Co. were as much for the advantage of Egan & Co. as of Moffatt. He was allowed to have possession of the limits of Egan, and to use the advances of Symes & Co., in manufacturing timber there, with the knowledge and consent of Egan & Co., and they now cannot reasonably object to Symes & Co. having the security for which they stipulated, and which was not beyond what was usual in such cases.

Duval, C. J., Mondelet, and Loranger, JJ., concurred.

A. & W. Robertson, for Appellants.

R. & G. Laflamme, for Respondents.

GIBSON, (plaintiff *par reprise d'instance*) Appellant; MOFFATT, (defendant in the Court below,) Respondent; and SUPPLE, (intervening party in the Court below.) Respondent.

Revendication.

Held, that a party cannot claim to be proprietor of the timber cut upon timber limits, while at the same time he brings an action for the price for which he sold the said timber.

MEREDITH, J. In the above case (No. 91.) in which Symes & Co. are intervening parties, the plaintiffs John Egan & Co., by a writ of *saisie-arrest*, seized as belonging to the defendant the timber which he made during the winter of 1855-6, and pledged for advances to Symes & Co., and in this cause, the plaintiff John Egan, one of the firm of John Egan & Co., seized under a *saisie revendication*, as belonging to the defendant, the timber which he manufactured in the winter of 1856-7, and pledged for advances to the present intervening party, John Supple. The whole of the said timber, as well that seized in the cause No. 91, as that seized in this cause, was cut upon the timber limits held in the name of John Egan, and which it was intended that the defendant should acquire under the agreement of the 13th July, 1855, to which reference is made in the course of my remarks in the case No. 91. The demand of the plaintiffs in the case No. 91, is founded on that agreement; and in the present case the same agreement is the basis of the defence.

The contention of the defendant is that by the agreement of the 13th July, 1855, upon which he is sued in the cause No. 91, he agreed to pay Egan & Co., in four annual instalments, £8,500, in consideration of their transferring to him certain timber limits upon which the timber seized in this cause had been cut; that they received from him in part payment of the said sum of £8,500, negotiable paper to the extent of £2,300, on account of which there has been paid £1800, that they allowed him to enter upon and manufacture timber on the said timber limits; and that the plaintiff whilst he joins his copartners in enforcing the agreement in question, as being binding on the defendant, cannot, as he attempts to do in the present case, treat that agreement as if it were null, by exercising an unqualified right of ownership over the timber limits, in consideration of which the defendant so agreed to pay £8,500, and as already mentioned has actually paid £1,800.

The fact that Egan & Co. received from the defendant a negotiable note for £1,500, on account of which £1,000 has been paid, is not denied; and I think that the right of the defendant to have credit for the other £800 is, as I have explained in the case No. 91, also established. It is true that under the agreement of July, 1855, the defendant was bound to give security within a certain time and that he has wholly failed to give that security, and the pretension on the part of the defendant that Egan & Co. waived their right to security, by taking a part of the purchase money without exacting security, is quite untenable. I think that Egan & Co. had, and still have, a right either to enforce the agreement irrespective of security, or to cause the agreement to be rescinded in consequence of the failure of the defendant to give security; but I do not see how the agreement can be binding upon the purchaser without being at the same time binding upon the vendors and each of them; and I therefore think that Egan, whilst joining with his copartners in suing for the price of the property sold by the agreement of July, 1855, cannot, in his own name, claim the ownership of that property as if it had not been sold. In a word, Egan & Co. had their option: as the defendant failed to give the stipulated

security, they had it in their power to cause the agreement to be treated as binding or as not binding, but they cannot treat it as binding upon one side, without admitting that it is binding upon the other, and in order to prevent misapprehension I may observe that I think Egan & Co. will have the same right after this action has been dismissed. They may, if they think fit, repudiate the agreement in consequence of the failure of the defendant to give them security, but they cannot, at one and the same time, claim the limits and also the consideration which the defendant agreed to give for those limits. According to this view, the judgment of the Court below, dismissing the plaintiff's demand, is right, and, as between the defendant and the intervening party, I think there can be no difficulty in maintaining the intervention which is not contested by the defendant.

Duval, C. J., Mondelet, and Loranger, JJ., concurred. [It was intimated by Judge Meredith that Judge Aylwin, who was unable to be present, also concurred in both these judgments.]

A. & W. Robertson, for Appellants.

R. & G. Laflamme, for Respondents.

BRADY, (plaintiff in the Court below,) Appellant; and BERGERON *et al.*, (defendants in the Court below,) Respondents.

Service of Declaration in cases of Saisie Gagerie—C. S. L. C. Cap. 83, Sec. 57.

Held, that under C. S. L. C. cap. 83, sec. 57, in cases of *saisie-gagerie*, it is sufficient service of the declaration to leave a copy at the prothonotary's office, and it is not necessary that the ordinary delays for service should be allowed between such service of declaration at the prothonotary's office and the return of the action.

This was an appeal from a judgment rendered by *Badgley, J.*, in the Circuit Court on the 30th of September, 1865, (reported 1 L. C. Law Journal, p. 67.) The plaintiff having issued a *saisie-gagerie* for rent, the defendant pleaded by *exception à la forme*, that the usual delay of five clear days should have been allowed between the service of the declaration and the return of the writ. It appeared that service of the declaration had been made by leaving a copy for each of the defendants, at the office of the clerk of the Circuit

Court, three days before the return of the action. Judge Badgley was of opinion that this was not sufficient, and, maintaining the exception, dismissed the plaintiff's action. From this judgment the plaintiff appealed.

DUVAL, C.J. Under cap. 83, sec. 57, the service was sufficient, and the judgment must be reversed.

Meredith, Drummond, and Mondelet, JJ., concurred.*

Day and Day, for Appellant.

T. and C. C. Delorimier, for Respondents.

KELLY (defendant in the Court below), Appellant; and MOREHOUSE (plaintiff in the Court below), Respondent.

Breach of Contract.

The only difficulty in this case arose from an involved account.

This was an appeal from a judgment rendered by *Smith, J.*, in the Superior Court at Montreal, on the 1st of April, 1864. The action was instituted to recover \$1549, for breach of a contract made at Sorel on the 18th of March, 1863, under which the defendant was to deliver 5,000 bushels of oats to the plaintiff, after the opening of the navigation. The plaintiff paid \$1300 on account, and, at the opening of the navigation, sent his boats to Sorel to receive the grain, notified the defendant that he was ready to receive it, and offered the balance of the price. The defendant, however, delivered only 550 bushels, and the plaintiff claimed damages to the extent of 10½ cents per bushel on the balance, making in all, including the amount overpaid, the sum now sued for. The plea admitted that only part of the oats had been delivered, but alleged that the plaintiff had not asked for the balance, and that his claim for damages and monies advanced was set off by a contra account of monies paid, goods sold, &c. The Court below having sustained the plaintiff's pretensions, the defendant appealed.

* This decision supplies the hiatus which certainly existed in the Statute, as to whether in these exceptional cases, it was necessary to allow the ordinary delay between service of declaration and the return of the action.

MEREDITH, J., dissenting. The difficulty is with respect to a payment of \$1600 said to have been made to one Dixon. Should this be imputed as a payment under the Morehouse contract, or under the Dixon contract? I am inclined to believe that it was paid under the present contract.

DUVAL, C.J. I admit that there is some difficulty in the case, but Rounds, the plaintiff's agent, has sworn positively that the \$1600 had nothing to do with the contract in this case. If the man has perjured himself, he must be prepared to take the consequences. We cannot do otherwise than confirm the judgment.

Drummond, and Mondelet, JJ., concurred.

J. Armstrong, for Appellant.

A. and W. Robertson, for Respondent.

DE BEAUJEU (plaintiff in the Court below), Appellant; and DESCHAMPS (defendant in the Court below), Respondent. (2) THE SAME. Appellant; and LALONDE (defendant *par reprise d'instance* in the Court below), Respondent.

Transaction—Discussion.

The plaintiff and defendant were parties to an *acte de transaction*, by which the defendant and other *tiers détenteurs* bound themselves to pay a certain proportion of the balance of a hypothecary debt due to the plaintiff by F., from whom they had purchased lands, after the amount of such balance should have been settled by the discussion of F.'s property, and application of the proceeds in reduction of the debt. The plaintiff having brought an action based on the *transaction*—*Held*, that the proof of the discussion of F.'s property was insufficient, and that the defendant was not bound to indicate the effects to be discussed.

As these two cases present the same question, with the same proof, it is only necessary to notice the first.

The appeal was instituted from a judgment of the Superior Court, rendered by *Loranger, J.*, on the 30th of April, 1864, dismissing the plaintiff's action. The facts were these:

On the 31st of January, 1821, one Filion made an obligation in favour of J. P. Saveuse de Beaujeu, *père*, for £1880, payable in four years, with a general hypothecation of his property. On the 24th of September, 1829,

Filion made another obligation in favor of De Beaujeu for £467, making, when added to the balance due on the former obligation, £1559, for which Filion gave a general hypothec on his property. It was alleged that at the time these deeds were passed, Filion was proprietor and in possession of the land now owned by the defendant. De Beaujeu, père, died in 1832, leaving to Madame de Beaujeu the usufruct of all his property, including the claim against Filion, who previous to this date, had sold to third parties all the property hypothecated in favour of De Beaujeu. On the 26th of December, 1839, the *détenteurs* of this property, including the defendant, by *acte de transaction* with the plaintiff, G.S. De Beaujeu, (acting in his own name, and as attorney for his mother, the *usufruitière* under the will,) acknowledged themselves to be the proprietors of these lands, and that said lands formerly belonged to Filion, and were included in the general hypothecation of his property under the obligation. It was further agreed, with the view to avoid an *action en déclaration d'hypothèque* on the part of Madame de Beaujeu, that the *détenteurs*, in case there remained a balance due after Madame de Beaujeu had discussed the property of Filion, should each pay her one-eleventh part of such balance, in four instalments, the first of which was to be payable three months after the discussion, and the remainder annually. This agreement was made with the condition that Madame de Beaujeu should deduct one-fourth from the balance of her claim; the whole without novation of Madame de Beaujeu's hypothecary claim on the property.

On the 19th of February, 1847, Mad. De Beaujeu died, leaving her property by will to her son, the plaintiff, and her daughter; and on the 18th of August, 1859, the plaintiff instituted the present action against the defendant for the sum of £474 personally due under the *acte de transaction*, and for £1,355 for his (the plaintiff's) claim under the obligation and mortgage. The defendant pleaded, first, that he had purchased the property from Filion in 1826, prior to the obligation of 1829, and that on the 23rd of September, 1829, Filion transferred to De Beaujeu, père, the balance due

for said land, and that by taking this transfer, De Beaujeu had bound himself not to bring any hypothecary claim against the property. Further, that at the date of the *transaction* of 1839, the defendant had acquired the prescription of ten years against any claim under the mortgage of 1821, and that he had been induced to become a party to the *transaction* through erroneous and fraudulent representations. The defendant's second plea was that the plaintiff could bring no action against him until he had discussed the property of Filion. This exception being maintained, and it being also held by the judgment of the Court below that the plaintiff had no hypothecary right of action, he instituted the present appeal. The grounds of appeal were that the discussion of Filion's property was clearly established, and that the hypothecary right of action was acknowledged in the *acte de transaction*.

DRUMMOND, J., after stating the facts, said: We are all unanimous in the opinion that the defendant was not bound to point out the effects of Filion that could be discussed, as the plaintiff pretends, and we think that the proof of discussion is not sufficient. Without entering into the other points of the case, we think there was no error in the judgment, and that it must be confirmed.

Duval, C. J., Meredith, and Mondelet, JJ., concurred.

R. & G. Laflamme, for Appellant.

Doutre & Daoust, for Respondent.

J B. T. DORION, (defendant in the Court below,) Appellant; and KIERZKOWSKI, (plaintiff in the Court below,) Respondent, (2) ZEPHIR DORION, (defendant in the Court below,) Appellant; and THE SAME, Respondent.

Usurious Interest—Premium.

An action by assignee to recover back usurious interest under the old law.

Held, that the money having been paid by only one of the assignors and his wife, the assignee could not legally claim under an assignment from the whole family.

Quare as to premium charged by agent.

These were appeals from a judgment of the Superior Court, rendered at Montreal on the

31st of December, 1863, by *Smith, J.*, condemning the defendants jointly and severally to pay the plaintiff the sum of £3958, and interest. The following were the circumstances that gave rise to the action: On the 11th of November, 1845, by deed passed at Montreal, the plaintiff, Kierzkowski, acting as well for himself as for the DeBartzch family, including himself and wife, L. T. Drummond and wife, S. C. Monk and wife, and Count Rottermund and wife, acknowledged himself indebted to Marie Louise Cousineau, represented by her son and attorney, the Appellant, in the sum of £4,875, for money lent for the purpose of paying off mortgages on the DeBartzch property. This loan was to be repaid with interest in eight years. During the six months following the 11th of November, 1845, Mad. Cousineau paid £3,375 to hypothecary creditors indicated by the borrowers. In 1853, she died, and left the Appellant and two other children her universal legatees. On the 21st of October, 1862, the respondent as assignee of the rights of the DeBartzch family, instituted the present action against the Appellant as well personally as the legatee and heir of Madame Cousineau his mother, and against Zephir Dorion, his brother. In this action it was declared that although the deed of 11th November, 1845, stated that £4,875 had been paid to the DeBartzch family, in reality they had only received £3325, the balance, £1,550, being retained by Dorion, the attorney of Mad. Cousineau, as usurious premium upon the loan; and a claim was made to recover back from the Appellant as representing Mad. Cousineau, the sum of £5,329, which it was alleged had been repaid her in excess of the amount of the loan.

The defendant admitted in his plea that a sum of £1,500 had been paid to him by the borrowers, but he alleged that this sum was not retained out of the capital of the loan made by his mother, but that it was paid to him by the borrowers as an indemnity for the loss of his time, and for his trouble in negotiating the loan, and that his mother, or himself as her legatee, could not be held responsible for it in any way. The defendant also represented the long period of time that had elapsed before the plaintiff instituted the

action. The judgment of the Court below having held that the £1,500 was exacted by Mad. Cousineau as usurious interest, the defendant appealed.

MEREDITH, J. (dissenting). It is evident that this case must be disposed of in exactly the same way as though 16 Vict. Cap. 80, had not been passed. According to my view, the plaintiff having a valid transfer of the rights of the DeBartzch family, had a right of action to recover the excess of interest paid to Madame Cousineau. The Appellant says the condemnation should not have been joint and several against the heirs; and, further, that they should not have been condemned to pay interest from the date of the deed of 1845. I think both these propositions well founded, and that the judgment should be rectified in these respects. Interest should only be computed from service of process.

DUVAL, C. J. It is undoubted that the action *condictio indebiti* is given to the debtor in a case like this, which, through a misconception on the subject of usury, was made an exception to the general rule that the *condictio indebiti* is not given to the debtor who has paid a sum of money with his eyes open. This exception was made because it was strangely thought that usury was forbidden by the laws of God, parties who took it being liable to a criminal prosecution in France, and to excommunication. These antiquated notions rested upon principles which are now known to have been erroneous. Still, it would be the duty of the judges to yield respect to the law and to aid a party in recovering money though paid voluntarily and in a manner highly beneficial to his interests, if the case came under the law. We come, then, to the consideration of the facts.

As to Zephir Dorion, brother of the agent who managed the loan, there is no proof against him whatever, and therefore the action against him should have been dismissed. The real actor was J. Bte. T. Dorion, who carried the whole matter through. I am convinced that his mother knew nothing of the usurious transaction. He admits that he got more than six per cent., and that he pocketed the surplus. His admission must be taken against himself. The case would then

stand in this position: Judgment could be pronounced under no circumstances against any one but J. Bte. Dorion. There could be no *solidarité* of condemnation, and thus the amount due by each would be reduced accordingly. Then, again, interest should not have been allowed on this money. The truth is there are objections at every stage of the proceedings. However, the judgment of the Court is based upon this: the respondent has obtained an assignment of the rights of the heirs DeBartzch, and brings his action as their assignee. Now, it is certain that the assignee has no more right than his assignors: they had no right in this case, for the money was not paid by them. This, in my view of the case, puts an end to the action. We must have dismissed the action if brought in the name of the assignors, and therefore we must dismiss it when brought in the name of the assignee. We restrict our judgment to this, that Mr. Kierzkowski has brought his action upon an assignment of rights which never existed. The judgment of the Court, in the first case, is that the judgment appealed from is erroneous, because by the evidence adduced, it is established that the sum of money claimed under the transfer of 18th March, 1862, was paid through and by the Hon. L. T. Drummond and Dame Josephite Elmiere Debartzch, his wife, who alone can claim the amount, if usurious and illegally exacted as pretended, and the other assignors, who have paid no part of said sum of money, have no right of action against the Appellants to recover any part of the sum, and consequently the judgment is reversed. In the case of Zephir Dorion, appellant, the judgment is also reversed, on the ground that the plaintiff has not proved the allegations of his declaration.

Mondelet, and Berthelot, JJ., concurred.

Leblanc, Cassidy & Leblanc, for the Appellants; *B. & G. Laflamme*, for the Respondent.

June 6.

VALLS, (defendant in the Court below,) Appellant; and THE BRITISH AMERICAN LAND Co., (plaintiffs in the Court below,) Respondents.

Damages—Assignment.

An action founded on an assignment. Assignment held to be valid.

This was an appeal from a judgment of the Superior Court in the District of St. Francis, rendered by *Short, J.*, on the 19th of March, 1863, by which the appellant was condemned to pay the sum of \$200, and interest.

The facts were these: The respondents, by deed of sale executed at London, England, on the 9th of January, 1855, purchased from Maria A. Cunningham, and Percy Arthur Cunningham, her husband, lots 5 and 6, in the 14th Range, and lot 6, in the 13th Range, Ascot, for the sum of £307 10s. stg. This land was purchased as free from all incumbrance, but on the 14th of October, 1858, the respondents were sued by the Appellant, Anna Maria Valls, in a hypothecary action, to *délaissier* the land, or pay a mortgage due her of \$1,200, for an annual allowance stipulated in her favor in the deed of settlement between the heirs of the late Hon. W.B. Felton, (the Appellant being his widow, and Maria A. Cunningham, his daughter,) for which the land was hypothecated. The respondents discovering the position of affairs, and finding their recourse against Percy Cunningham at that time of little worth, made an offer to the Appellant to purchase her claim against Cunningham and his wife, to hold it, in order that, if they came into possession of property thereafter, the Company might obtain indemnity for their loss, and prevent further mortgage from accruing. The Appellant agreed to assign to the respondents her *demande*, as well what had accrued as what might thereafter accrue, against Maria Cunningham and her husband, under the deed of settlement, for the sum of \$200, and the assignment was made accordingly. Some time after this, Cunningham upon the death of his father, came into possession of property and a title, and amongst other property he acquired a farm known as *The Edson Place*, in Barnston, worth \$1,200. The Appellant, though she had transferred her debt to the Respondents, caused an action to be instituted against Sir Percy Cunningham for £325, the amount of her claim under the deed of settlement, obtained judgment against him as an absentee, and caused *The Edson Place* and some other property to be seized and sold.

The respondents alleged that they had no

intimation of these proceedings, and the present action was instituted to recover \$1,600 as damages for the acts of the Appellant who, after transferring her claim to them, had levied some \$1,600 by execution against the property of Sir Percy Cunningham.

To this action the Appellant pleaded, by peremptory exception, that the assignment was made for the purpose of enabling the respondents to bring an action against Cunningham and his wife in England, and that the only sum intended to be permanently transferred was the sum of \$200, paid by the respondents in discharge of the mortgage on the land named in the assignment.

The case proceeded to judgment without any evidence being adduced on the part of the defendant, except answers to interrogatories on *faits et articles*, but before judgment the plaintiffs limited their *demande* to \$200, with interest from the time they had paid this sum, and judgment went in their favor accordingly. The defendant now appealed, contending that the assignment was illegal and could not be enforced, and that she had only received from the proceeds of the Sheriff's sale the sum of \$100, less the costs.

The judges of the Court of Appeals (Duval, C.J., Meredith, Drummond, Mondelet and Polette, JJ.,) were unanimously of opinion that there was no error in the judgment of the Court below, and that it must be confirmed with costs.

Fellon & Griffith, for Appellant.

Sanborn & Brooks, for Respondents.

Quebec, June 19th.

(Duval, C.J., Aylwin, Meredith, Drummond, and Mondelet, JJ.)

WOODMAN, and GENIER, (Montreal case,) Preliminary exception rejected.

Quebec, June 20th.

(Duval, C. J., Aylwin, Drummond, Mondelet and Badgley, JJ.)

O'NEILL, and THE MAYOR OF QUEBEC, Judgment confirmed.

(Duval, C. J., Aylwin, Drummond, and Mondelet, JJ.)

BELL and STEPHEN, confirmed.

BROWN and LOWRY, confirmed.

LAROCHELLE and MAILLOUX, reversed.

LEPAGE and STEVENSON, confirmed.

KEMPT and LETELLIER, confirmed, Drummond, J., dissenting.

KEMPT and LAMONTAGNE, confirmed, Drummond, J., dissenting.

BETTERSWORTH and HOUGH, confirmed.

BLAIS and BLOUIN, confirmed.

RECENT ENGLISH DECISIONS.

CHANCERY APPEAL CASES.

Incomplete Gift—Parol declaration of Trust.—A father put a cheque for £900 into the hand of his son of nine months old, saying, "I give this to baby for himself," and then took back the cheque and put it away. He also expressed his intention of giving the amount of the cheque to the son. Shortly afterwards the father died, and the cheque was found amongst his effects:—*Held*, under the circumstances, that there had been no gift to or valid declaration of trust for the son. *Jones v. Lock*, Ch. Ap. 25. Lord Cranworth said: "It was all quite natural, but the testator would have been very much surprised if he had been told that he had parted with the £900, and could no longer dispose of it. It all turns upon the facts, which do not lead me to the conclusion that the testator meant to deprive himself of all property in the note, or to declare himself a trustee of the money for the child. I extremely regret this result, because it is obvious that, by the act of God, this unfortunate child has been deprived of a provision which his father meant to make for him."

BILLS WITHDRAWN.—Owing to the pressure of business at the end of the session, the bill for the establishment of public libraries, and also the bill for doing away with public executions, to which we have before alluded, were not carried through, and were withdrawn.

THE COUNTY OF TWO MOUNTAINS.—Mr. Daoust, M.P.P., the defendant in the case of *Regina v. Daoust*, reported in the last number of the *Journal*, resigned his seat as representative of the County of Two Mountains in the Legislative Assembly, on the 6th of July last, but has since been re-elected by his constituents.

The Lower Canada Law Journal.

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THE EXTRADITION OF LAMIRANDE.

He who would desire to laud the administration of justice in this land, to speak pleasant things of the energy and vigour of the Bench in carrying out laws and treaties with the purpose of doing substantial justice, or who would fain dwell with well buttered phrase on the manly and upright firmness of public officers in keeping within the limits of their duty, he, we say, who would like to speak or write after this fashion, had better avoid the subject of extradition, and our extradition cases. Some fatality hangs over them, some blunder besets them, some suspicion of crooked dealing ever attends them. The most recent case, that of LAMIRANDE, only furnishes another unfortunate example. We see a man carried from our shores who in the opinion, be it right or wrong, of the judges of our highest Court, is innocent of the crime imputed to him. As far as the individual is concerned, for aught we know, there may be no room for sympathy or commiseration. Unfaithful to the trust reposed in him, fearing to face a jury of his countrymen, betaking himself beyond the seas, and, in the first instance, successfully evading his captors, he is probably as great a culprit as any poor rogue who is really and truly guilty of forgery as defined by our law. But we did not expect to see a counsel learned in the law, and holding high office, attempting to divert attention from the true issue by representations of the worthlessness of the individual, or forgetting that an innocent man may to-morrow be the victim of some hasty and highhanded proceeding, which would seek shelter behind the precedent of LAMIRANDE's case, if such precedent were permitted by the silence and apathy of the public.

But one practical result seems likely to flow from the unfortunate occurrences of the past few weeks. The privilege of the great writ is to be carefully guarded now, when the fair fame of the country has been tarnished,

and when American citizens amongst us talk of placing themselves under the consular flag for protection. Henceforth, some (not all) of our judges have stated, the writ of habeas corpus is to issue immediately, and the prisoner is thus to be brought before the Court.

As a record of a case of no little importance it may be interesting that the facts should be stated, and we accordingly avail ourselves of the statement drawn up by Mr. Justice DRUMMOND, read by him in Chambers on Tuesday, the 23rd of August, and subsequently forwarded to His Excellency the Governor General. We also append a letter written to the *Montreal Gazette*, by Mr. RAMSAY, stating the case from an opposite point of view, for the satisfaction of those who may think the Judge's narrative too highly coloured.

The statement of Mr. Justice DRUMMOND is as follows:—

"On the 26th July last a document under the signature of His Excellency the Governor General, purporting to be a warrant for the extradition of the petitioner, issued under the authority vested in his Excellency by the provisions of the statute passed by the Legislature of the United Kingdom of Great Britain and Ireland, in the sixth and seventh years of Her Majesty's reign, intitled "An act to give effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders," setting forth that the said petitioner stood accused of the crime of "forgery by having, in his capacity of cashier of the Bank of France at Poitiers, made false entries in the books of the said bank, and thereby defrauded the said bank of the sum of seven hundred thousand francs;" that a requisition had been made to His Excellency by the Consul-General of France in the Province of British North America, to issue his warrant for the arrest of the said prisoner, and requiring all the justices of the peace and other magistrates and officers of justice within their several jurisdictions, to aid in apprehending the petitioner and committing him to jail.

Under this document the prisoner was arrested, and after examination before William H. Brehaut, Esq., police magistrate and justice of the peace, was fully committed to the common jail of this district on the 22nd day of the current month of August.

On the following day, between the hours of 11 and 12 o'clock in the forenoon, notice was given in due form by the prisoner's counsel to the counsel charged with the criminal prosecutions in this district, that he (the counsel for the prisoner) would present a petition to any

one of the judges of the Court of Queen's Bench who might be present in Chambers at one o'clock in the afternoon of the following day, (the 24th) praying for a writ of *Habeas Corpus* and the discharge of the prisoner.

At the time appointed this petition was submitted to me.

Mr. J. Doutré appeared for the petitioner, Mr. T. K. Ramsay for the Crown, and Mr. Pominville for the private prosecutor.

A preliminary objection, raised on the ground of insufficient notice, was overruled. Mr. Doutré then set forth his client's case in a manner so lucid, that I soon convinced myself, after perusing the statute cited in the warrant of extradition, that the warrant itself—the pretended warrant of arrest alleged to have been issued in France—*arrêt de renvoi*—and all the proceedings taken with a view to obtain the extradition of the petitioner, were unauthorized by the above cited statute, illegal, null, and void, and that the petitioner was, therefore, entitled to his discharge from imprisonment.

But as Mr. Pominville, whom I supposed to be acting as counsel for the Bank of France, wished to be heard, I adjourned the discussion of the case until the following morning. I would have issued the writ before adjourning, had the counsel for the prisoner insisted upon it. But that gentleman was no doubt lulled into a sense of false security, by the indignation displayed by the counsel for the Crown, when Mr. Doutré signified to me his apprehension that a *coup de main* was in contemplation to carry off the petitioner before his case had been decided.

On the following morning, Saturday, the 25th of this month, I ordered the issuing of a writ of *habeas corpus* to bring the petitioner before me with a view to his immediate discharge.

My determination to discharge him was founded upon the reasons following.

1st. Because it is provided by the first section of the Act of the British Parliament to give effect to a Convention between Her Majesty and the King of the French, for the apprehension of certain offenders (6 and 7 Vic., ch. 75), that every requisition to deliver up to justice any fugitive accused of any of the crimes enumerated in the said Act, shall be made by an *ambassador of the Government of France, or by an accredited diplomatic agent*; whereas the requisition made to deliver up the petitioner to justice has been made by Abel Frederic Gauthier, Consul General of France in the Provinces of British North America, who is neither an ambassador of the Government of France nor an accredited diplomatic agent of that Government, according to his own avowal upon oath.

2ndly. Because, by the 3rd section of the said statute, it is provided that no Justice of

the Peace, or any other person, shall issue his warrant for any such supposed offender until it shall have been proved to him, upon oath or affidavit, that the person applying for such warrant is the bearer of a warrant of arrest or other equivalent judicial document, issued by a judge or competent magistrate in France, authenticated in such manner as would justify the arrest of the supposed offender in France upon the same charge, or unless it shall appear to him that the act charged against the supposed offender is clearly set forth in such warrant of arrest or other judicial document; whereas the Justice of the Peace who issued his warrant against the Petitioner, issued the same without having any such proof before him, the only document produced before him, as well as before me, in lieu of such warrant of arrest or other equivalent judicial documents, being a paper writing alleged to be a translation into English of a French document, made by some unknown and unauthorized person in the office of the counsel for the prosecutor at New York, and bearing no authenticity whatever.

3rd. Because, supposing the said document purporting to be a translation of an *acte d'accusation* or indictment, accompanied by a pretended warrant for arrest and designated as an *arrêt de renvoi*, to be authentic, it does not contain the designation of any crime comprised in the number of the various crimes, for or by reason of the alleged commission of which any fugitive can be extradited under the said statute.

4th. Because by the first section of the said act it is provided that no Justice of the Peace shall commit any person accused of any of the crimes mentioned in the said act (*to wit murder, attempt to commit murder, forgery, and fraudulent bankruptcy*) unless upon such evidence as according to the laws of that part of Her Majesty's dominions in which the supposed offender shall be found, would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be accused had been there committed.

Whereas the evidence produced against the Petitioner upon the accusation of forgery brought against him before the committing magistrate, would not have justified him in apprehending or committing the Petitioner for the crime of forgery, had the acts charged against him been committed in that part of Her Majesty's dominions where the Petitioner was found, to wit, in Lower Canada.

5th. Because the said warrant for the extradition of the Petitioner, as well as the warrant for his apprehension, does not charge him with the commission of any of the crimes for which a warrant of extradition can be issued under the said statute; inasmuch as in both of the said warrants the alleged offence is

charged against the Petitioner as "forgery by having in the capacity of Cashier of the branch of the Bank of France at Poitiers made false entries in the books of the Bank, and thereby defrauded the said Bank of the sum of seven hundred thousand francs."

Whereas the said offence as thus designated does not constitute the crime of forgery according to the laws of England and Lower Canada, for, to use the words of Judge Blackburn when he pronounced judgment concurrently with C. J. Cockburn and Judge Shee, in a case analogous to this (*Ex parte, Charles Windsor, C. of Q.B., May, 1865*), "Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument purporting to be that which it is: it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced to writing."

The Gaoler's return to this writ of *Habeas Corpus* was that he had delivered over the prisoner to Edme Justin Melin, *Inspecteur Principal de Police de Paris*, on the night of the twenty-fourth instant, at twelve o'clock, by virtue of an order signed by M. H. Sanborn, Deputy Sheriff, grounded upon an instrument signed by His Excellency the Governor General.

It appears that the petitioner thus delivered up to this French policeman is now on his way to France, although his extradition was illegally demanded, and although he was accused of no crime under which he could have been legally extradited; and although, as I am credibly informed, His Excellency the Governor General had promised, as he was bound, in honour and justice, to grant him an opportunity of having his case decided by the first tribunal of the land before ordering his extradition.

It is evident that His Excellency has been taken by surprise, for the document signed by him is a false record, purporting to have been signed on the 23rd instant, at Ottawa, while His Excellency was at Quebec, and falsely certified to have been recorded at Ottawa before it had been signed by the Governor General.

In so far as the Petitioner is concerned, I have no further order to make, for he whom I was called upon to bring before me is now probably on the high seas, swept away by one of the most audacious and hitherto successful attempts to frustrate the ends of justice which has yet been heard of in Canada.

The only action I can take, in so far as he is concerned, is to order that a copy of this judgment be transmitted by the Clerk of the Crown to the Governor General, for the adoption of such measures as His Excellency may

be advised to take to maintain that respect which is due to the Courts of Canada and to the laws of England.

As to the public officers who have been connected with this matter, if any proceedings are to be adopted against them, they will be informed thereof on Monday, the 24th day of September next, in the Court of Queen's Bench, holding criminal jurisdiction, to which day I adjourn this case for further consideration."

The following is Mr. RAMSAY's letter:—

To the Editor of the Montreal Gazette.

SIR,—The *Herald* of this morning contains two columns of the report of a pretended judicial proceeding in the Lamirande case, accompanied by a characteristic attack on the Attorney General. It is very plain that the declamation of Mr. Justice Drummond and Mr. Doutre *apropos* of nothing, (for there was no case, and neither of them ventured to move for or take any rule or other proceeding,) was simply intended to give Mr. Cartier's enemies a pretext for abusing him,—so impossible is it, without rectitude of purpose and complete sobriety, to overcome the recollection of political defeat. But my object is not to review or attempt to answer the contradictions and absurdities of these tirades. I feel perfectly satisfied that nothing I can say or write will ever prevent Mr. Justice Drummond from at all times preferring effect to truth; and therefore my explaining to him that to call the giving up of a prisoner on the warrant of the Governor, kidnapping, is simply a naked falsehood, would be pure waste of time. I shall therefore briefly state how and why Lamirande was given up, and from that it will at once be obvious that the outcry of Mr. Drummond and Mr. Doutre is simply beside the question.

We have a treaty with France enforced by an Imperial statute, by which we agree to give up persons accused of certain offences therein enumerated. The procedure is this: The French Government claims the extradition of the accused, and the Governor (in the colonies) issues his warrant, charging all justices, and officers of justice to aid in the capture of the fugitive. On his apprehension, he is brought before the magistrate, who deals with the charge, or who ought to deal with it, precisely as if the offence had been committed here. This being done, the prisoner is either fully committed or he is discharged. If committed, the papers are forwarded to the Government, and the Governor issues his warrant for the extradition of the prisoner, who is at once delivered up, provided there be no other cause (*i.e.*, criminal cause) for his detention. It is an error to suppose that there

is any right of appeal from the decision of the Governor; but if application is made in proper time, a writ of *habeas corpus* may be procured, which would have the effect of bringing the prisoner before the Court or Judge to examine into the cause of his detention. In Lamirande's case no such writ was either granted or issued, and therefore it is positively untrue that the prisoner was in the hands of the Court or Judge, as Mr. Drummond said. Without this writ there was no power known to the law to stop the execution of the Governor's warrant; and this I at once explained to Mr. Justice Drummond in Chambers on Saturday morning, when he first spoke to me on the subject. I then told him that had the Sheriff consulted me, which he did not, I should have advised him to obey the warrant without a moment's loss of time. So unanswerable was this that Mr. Drummond, shifting his ground, said that he had put in a commitment before the removal of the prisoner; but I afterwards found that what he was pleased to call a commitment, was no commitment at all; but an order not to deliver Lamirande up on any warrant whatever. What renders this proceeding doubly ludicrous is that Mr. Justice Drummond was the person most terribly severe upon Mr. Justice Mondelet for his order in the Blossom case; yet when Mr. Mondelet gave that order he was sitting as the Court of Queen's Bench, whereas when Mr. Drummond gave his, he was prowling about the town at night, without any official character whatever, but that of a Justice of the Peace. On Saturday afternoon Mr. Justice Drummond again shifted his ground, and he was pleased to tell me that it was my *duty* to interfere in some way or another, and prevent the Governor's warrant taking effect. For Mr. Justice Drummond's information, let me say that when I seek a guide as to duty, I shall endeavour to select some one more immaculate than him; but in so far as regards the present case, I may add, that I was very unlikely to commit an illegality to prevent the extradition, inasmuch as I highly approve of it.

And now one word as to the prisoner. Lamirande was cashier of the Bank of France at Poitiers, and he there robbed his employers of 700,000 francs (£28,000 stg.) falsified books and entries (forged as the French court calls it) and fled to the United States. Being arrested there and about to be extradited, he managed to drug his guard and escape to Canada, while his lawyer stole the *arrêt de renvoi*, or French indictment, which formed part of the record before the commissioner. And this is the person for whom Mr. Justice Drummond felt so lively a personal interest as to induce him to abandon the retirement of his home, and endure the fatigue of sitting in Chambers for, I believe, almost the first time

since the beginning of vacation. While talking of conspiracy it would be however interesting to learn from Mr. Drummond, at whose invitation he undertook to adjudicate in Lamirande's case. The effort was not unpremeditated, for the interesting fact was duly *heralded* on Friday morning.

Your obedient servant,

T. K. RAMSAY.

Montreal, 27th August, 1866.

The GOVERNOR GENERAL telegraphed by the cable a statement of the case to the COLONIAL SECRETARY, and a private telegram was also sent to solicitors in London, but all efforts to detain LAMIRANDE in England proved unsuccessful, chiefly because there was no Judge in London (vacation having commenced) before whom an application for *habeas corpus* could be made. LAMIRANDE was accordingly taken to Paris.

At the moment of our going to press, Mr. Justice DRUMMOND has thought proper to take proceedings against Mr. RAMSAY, the representative of the ATTORNEY GENERAL, in respect of the above letter, and another which Mr. RAMSAY shortly afterwards wrote to the *Montreal Gazette*. An account of these proceedings we are obliged to reserve till our next issue.

LAW REPORTING.

The new scheme for publishing Law Reports in England, which went into operation on the 1st of January, we have already noticed. Subsequently, the Irish Bar appointed a committee to remodel their system of Law Reporting on the principle of the English Law Reports. The committee reported a scheme similar to that of the English Bar. The price of the Reports is to be fixed at three guineas per annum to subscribers, and the committee reckon on having 400 subscribers.

We notice by the last number of the *Upper Canada Law Journal* that a similar move has been made there. The Law Society are to assume the work of publishing the reports, but the expense is to be defrayed in a way which we do not think very desirable. The reports are to be furnished free, but all

practitioners will have to pay an annual contribution to the Law Society, under the authority of an Act passed last Session.

NEW TRIAL FOR FELONY^{*}

To the Editor of the Lower Canada Law Journal:

In the case of *Regina v. Daoust*, reported in this month's number of the Law Journal, the decision seems in my humble opinion one which is to be regretted, inasmuch as it is universally acknowledged to be desirable, in all cases of criminal jurisprudence where there is not some express provincial statutory provision to the contrary, to follow the English precedents and thus keep the laws of the two countries, which relate to criminal matters, as much as possible alike.

Now altho' "it seems hitherto to have been assumed that no new trial could be granted in cases of felony,"* and even Russell in former editions states that it should not be granted; still the later decisions lie the other way, and in the fourth London edition of Russell, brought out last year by Charles Spengel Greaves Esq., Q. C., the opinion given by Mr. Justice Mondelet at Daoust's trial is maintained to be the correct one. At page 213 (Bk: vi. cap: 1,) of this edition it is laid down that "where the defendant has been convicted on an indictment either for felony or for a misdemeanor, a new trial may be granted at the instance of the defendant where the justice of the case requires it;" and most certainly if ever the justice of any case required it it was that of Mr. Daoust.

Speaking of this edition of Russell the "Quarterly Journal of Jurisprudence" for May 1866, (*London, Butterworths, 7 Fleet st.*) says—its "chief value is imparted to it by the editorship of Mr. Greaves, and for this work no one at the bar could present better claims. Some of the most important statutes that have been passed in late years, with the view of amending our criminal procedure and law were framed by his own hands." "In his editorship of this book he has done full justice to his eminent attainments and reput-

ation." "We have in this book a safe and standard treatise on our criminal law."

In Welsby's fifteenth edition of Archbold (1862) the same thing is maintained, and it is there stated that "it was formerly said that no new trial could be granted in a case of treason or felony where the proceedings had been regular, but now the Court of Queen's Bench, when the record is before that Court, will in its discretion order a new trial in cases of *felony*, where evidence has been improperly admitted, or where the jury have been misdirected." And surely, if it is a principle that a new trial may be granted "where evidence has been improperly admitted," it is a good deduction from it, that a new trial may be granted where important evidence has been omitted from ignorance of its existence, as in the case under discussion.

The contrary opinion—that there can be no new trial in a case of felony—which Mr. Justice Drummond calls "the old law," was founded upon a remark not a decision of Lord Kenyon's, made in *R. v. Mauby, Bart., et al*: 6 T. R. 638, when, in granting a new trial for misdemeanor, he said, "In one class of cases indeed, greater than misdemeanors, no new trial can be granted at all," and this has since generally been looked upon as a statement of what the common law was held to be at the time; but Lord Kenyon did not give judgment upon the case of a new trial for felony, and, even if he had, might he not have mistaken the common law? How often do we find the decisions of the first jurisconsults subsequently over-ruled. Mr. Greenleaf has published a volume, compiled with great labour and perseverance, of "over-ruled decisions."

I make these remarks, Mr. Editor, simply because I hold it to be a desideratum that we in Canada should keep pace with the liberal and advanced views of modern English criminal legislators, and in the hope that should the question again be brought before our Courts it may obtain a reconsideration.

IVAN T. WOTHERSPOON.

Quebec, 10th August, 1866.

* Denison and Pearce, C. C. p. 281.

MAGIC AND WITCHCRAFT.

In England, the first law against witchcraft was made under Henry VIII. It was repealed in the following reign, but renewed under Elizabeth. In Lecky's (recently published) "History of the Rise and Influence of the Spirit of Rationalism in Europe," the author writes as follows:—"Soon after the accession of James to the throne of England, a law was enacted, which subjected witches to death on the first conviction, even though they should have inflicted no injury upon their neighbours. This law was passed when Coke was attorney-general, and Bacon a member of parliament; and twelve bishops sat upon the commission to which it was referred. The prosecutions were rapidly multiplied throughout the country, but especially in Lancashire; and at the same time the general tone of literature was strongly tinged with the superstition. Sir Thomas Browne declared that those who denied the existence of witchcraft, were not only infidels, but also, by implication, atheists. Shakespeare, like most of the other dramatists of his time, again and again referred to the belief; and we owe to it that melancholy picture of Joan of Arc, which is, perhaps, the darkest blot upon his genius. Bacon continually inveighed against the follies shown by magicians in their researches into nature; yet in one of his most important works, he pronounced the three 'declinations from religion' to be 'heresies, idolatry, and witchcraft.' "

The description of the tortures inflicted in Scotland on old and feeble women, is deeply painful and revolting. "If the witch was obdurate, the first, and it was said the most effectual, method of obtaining confession, was by what was termed 'waking her.' An iron bridle or hoop was bound across her face with four prongs, which were thrust into her mouth. It was fastened behind to the wall by a chain, in such a manner that the victim was unable to lie down; and in this position she was sometimes kept for several days, while men were constantly with her to prevent her from closing her eyes for a moment in sleep. Partly in order to effect this object, and partly to discover the insensible mark which was the sure sign of a witch, long pins were thrust

into her body. At the same time, as it was a saying in Scotland that a witch would never confess while she could drink, excessive thirst was often added to her tortures. Some prisoners have been waked for five nights; one, it is said, even for nine.

"The mental and physical suffering of such a process was sufficient to overcome the resolution of many, and to distract the resolution of not a few. But other and perhaps worse tortures were in reserve. The three principal, that were habitually applied, were the penny-winkie, the boots and the caschielawie. The first was a kind of thumbscrew; the second was a frame in which the leg was inserted, and in which it was broken by wedges, driven in by a hammer; the third was also an iron frame for the leg, which was from time to time heated over a brazier. Fire-matches were sometimes applied to the body of the victim. We read in a contemporary legal register, of one man who was kept for forty-eight hours in 'vehement tortour' in the caschielawie; and of another, who remained in the same frightful machine for eleven days and eleven nights, whose legs were broken daily for fourteen days in the boots, and who was so scourged that the whole skin was torn from his body. This was, it is true, censured as an extreme case, but it was only an excessive application of the common torture.

"How many confessions were extorted, and how many victims perished by these means, it is now impossible to say. A vast number of depositions and confessions are preserved, but they were only taken before a single court, and many others took cognizance of the crime. We know that in 1662, more than 150 persons were accused of witchcraft; and that in the preceding year no less than fourteen commissions had been issued for the trials. After these facts, it is scarcely necessary to mention, how one traveller casually notices having seen nine women burning together at Leith in 1664, or how, in 1678, nine others were condemned in a single day. The charges were, indeed, of the most comprehensive order, and the wildest fancies of Sprenger and Nider were defended by the Presbyterian divines. In most Catholic countries, it was a grievance of the clergy, that the civil power refused to

execute those who only employed their power in curing disease. In Scotland such persons were unscrupulously put to death. The witches were commonly strangled before they were burnt, but this merciful provision was very frequently omitted. An Earl of Mar (who appears to have been the only person sensible of the inhumanity of the proceedings) tells how, with a piercing yell, some women once broke half-burnt from the slow fire that consumed them, struggled for a few moments with despairing energy among the spectators, but soon, with shrieks of blasphemy and wild protestations of innocence, sank writhing in agony amid the flames."

"Until the close of the seventeenth century, the trials (in Scotland) were sufficiently common, but after this time they became rare. It is generally said that the last execution was in 1722; but Captain Burt, who visited the country in 1730, speaks of a woman who was burnt as late as 1727. As late as 1773, 'the divines of the Associated Presbytery' passed a resolution declaring their belief in witchcraft, and deploring the scepticism that was general.

"In England, three witches had been executed in 1682; and others, it is said, endured the same fate in 1712; but these were the last who perished judicially in England. The last trial, at least of any notoriety, was that of Jane Wenham, who was prosecuted in 1712, by some Hertfordshire clergymen. The judge entirely disbelieved in witches, and accordingly charged the jury strongly in favour of the accused, and even treated with great disrespect the rector of the pariah, who declared 'on his faith as a clergyman,' that he believed the woman to be a witch. The jury, being ignorant and obstinate, convicted the prisoner, but the judge had no difficulty in obtaining a remission of her sentence. A long war of pamphlets ensued, and the clergy who had been engaged in the prosecution, drew up a document strongly asserting their belief in the guilt of the accused, animadverting severely upon the conduct of the judge, and concluding with the solemn words, 'Liberavimus animas nostras.'

"It is probable that no class of victims endured sufferings so unalloyed and so intense.

Not for them the wild fanaticism that nerves the soul against danger, and almost steels the body against torments. Not for them the assurance of a glorious eternity, that has made the martyr look with exultation on the rising flame, as on the Elijah's chariot that is to bear his soul to heaven. Not for them the solace of lamenting friends, or the consciousness that their memories would be cherished and honoured by posterity. They died alone, hated and unpitied. They were deemed by all mankind the worst of criminals. Their very kinsmen shrank from them as tainted and accursed."

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

MONTREAL, Sept. 7th.

EVANS, (plaintiff in the Court below) Appellant; and CROSS *et al.*, (defendants in the Court below) Respondents.

Composition—Unfair advantage—Pleading.

To an action on a note, the defendants pleaded an *acte* of composition, alleged to be of later date than the note, to which *acte* the plaintiff was a party, and by which he agreed to take 10s. in the £., and "that by signing said *acte* of composition, the conditions whereof have long since been fulfilled, the plaintiff discharged and released the said defendants from all the claims and rights which the said plaintiff had or might have had, or pretended to have previous to the execution and taking effect of said *acte*."

Held, (Meredith, J., and Duval, C. J., dissenting) that the plea was sufficient, and that it was not necessary for the defendants to allege that the note sued upon was given to induce the plaintiff to sign the *acte* of composition, or that it secured to him an unfair advantage over the other creditors.

Martin and *Macfarlane* commented upon.

This was an appeal from a judgment rendered by *Smith, J.*, in the Superior Court at Montreal, on the 31st of October, 1864, and confirmed by *Smith, Berthelot, and Monk, JJ.*, sitting as a Court of Review, on the 25th of January, 1865. The action was instituted to recover the sum of \$213.32, amount of a promissory note made by the respondents in favor of the Appellant, dated May 5th, 1862, and payable twenty four months after date.

The defendants by peremptory exception, pleaded to the following effect: That by an *acte of composition sous seing privé*, entered into on or about the 22nd of May, 1862, between the firm of Cross & Park (the defendants) and their creditors, the latter agreed to accept a composition of 10s. in the £. said composition, when paid, to be in full satisfaction and discharge of claims against the defendants. That the plaintiff had signed the *acte of composition*, and thereby discharged the defendants from all claims, including the note sued upon, which being of a date anterior to the taking effect of the composition, came under it and was discharged.

In the Court below the action was dismissed on the ground that the defendants had established that the note sued on by the plaintiff was due and owing before the day of the settlement of the composition, accepted by the plaintiff in full discharge of all sums due and owing by the defendants. This judgment was confirmed in Review, the Court remarking that the note, being dated before the *acte of composition*, was therefore due at the date of that *acte*, and was necessarily included in its operation. From this judgment the plaintiff appealed, submitting that the Court below, in assuming that the note in question was due and owing at the time the composition was effected, and that it fell within its operation, was clearly in error.

MEREDITH, J. In this case I dissent from the majority of the Court, and the Chief Justice (absent through illness) concurs with me. The action is brought upon a promissory note, and the defendants allege that on the 22nd of May, 1862, a deed of composition was executed, and that the note sued upon formed part of the debt compounded for by the plaintiff. The *acte of composition* is in the following words: "The subscribing creditors of Cross & Park, traders, Beauharnois, hereby agree for themselves, their heirs and assigns, to accept from the said Cross & Park, a composition of 10s. in the £., payable with satisfactory security, in equal proportions of six, twelve, and eighteen months, from 20th day of March last past, said composition, when paid, to be in full satisfaction and discharge of our respective claims against them—provided this

arrangement be carried into effect on or before the 1st day of June, now next ensuing."

The signature of the plaintiff is subscribed, and it is admitted that the notes given in satisfaction of the composition have been paid. The question then is this: Is the plaintiff's action barred by the deed of composition? The sole evidence of the defendants consists of the deposition of the plaintiff, of which they declare that they take advantage. The statement produced by the defendants at *enquête* shows that the plaintiff's claim amounted to \$342.40. The three composition notes of \$57.07 each, less interest, amounted to \$158.58, and the balance \$183.82 was settled for by the note for \$213.32, payable at 24 months, which is the ground of this action. The statement concludes with these words: "Settled as above, it being understood that Messrs Cross & Park pay all the costs of suit in cash."

It seems to me as plain from this statement, as anything can be made by figures, that the note sued upon was not included in the debt compounded for, and I think the plaintiff should have had judgment for the amount. But I think it is equally plain that the note sued upon was given to the plaintiff to induce him to sign the *acte of composition*. The plaintiff himself admits that if he recovered the amount of this note, he would have received twenty shillings in the £. for the whole of his claim. I would therefore have been of a different opinion, had the defendants stated in their plea that the note was given to the plaintiff to induce him to sign the composition, and for the purpose of securing to him an unfair advantage over the other creditors. This point has already been decided by the Court in the case of *Martin and Macfarlane* (1 L. C. Law Journal, p. 55). There is no such plea in this case, and therefore I think the plaintiff's action should have been maintained.

AYLWIN, J. It is to be observed that there is no attempt on the part of the plaintiff to show that the terms of the agreement have not been faithfully carried out by the defendants. On the contrary, there is conclusive evidence of the fact that every farthing of the composition money has been paid. For, by the terms of the agreement, the defendants were

to pay in cash the costs of the suit which had then been instituted. And it is perfectly clear that they must have paid these costs, because there is no demand made here for them. I think the reasons urged by the appellant for the reversal of the judgment are insufficient, and that the judgment was perfectly correct.

DUMMOND, J. It is said that the action should be maintained, because the plea is insufficient—because it was not pleaded that the note was given to induce the plaintiff to sign the agreement, by securing to him an unfair advantage over the other creditors. I think, however, the plea is quite sufficient. It is stated clearly "that by signing the said *acte* of composition, the conditions whereof have long since been fulfilled, he (the said John Henry Evans) discharged and released the said defendants from all the claims and rights which the said John Henry Evans had, or might have had, or pretended to have, previous to the execution and taking effect of said *acte*." I am of opinion that this is sufficient. The case of *Martin* and *Macfarlane* was a very different case; there was no plea in that case at all. I concur with the majority here in thinking that the judgment should be confirmed.

MONDELET, J., concurred.

Judgment confirmed, Duval, C.J., and Meredith, J., dissenting.

S. Bellune, Q.C., for the Appellant.

R. C. Cowan, for the Respondents.

BRYSON (plaintiff in the Court below), Appellant; and STUTT (defendant in the Court below), Respondent.

License—Boundary of Limit.

The plaintiff obtained a lease to cut timber upon a location described on the back of the license as follows: "To commence at the mouth of Green's Creek, on the Black River, and extend down six miles on the course South 21° West, and back four miles on the course North, 69° West." The question having arisen as to whether certain timber seized had been cut on this location:—

Held, that the words "down on the course" in the license, meant "down the Black River on the course," and that the word "back" meant "back from the Black River."

This was an appeal from a judgment of the

Superior Court at Aylmer, rendered by *LaFontaine, J.*, on the 9th of March, 1865, dismissing the plaintiff's action. The facts were these:—On the 16th of January, 1857, the plaintiff obtained from the Inspector of Crown Timber Licenses at Ottawa, a License to cut Red and White Timber upon a certain location in the vicinity of Black River, one of the tributaries of the Ottawa. The description on the back of the license was as follows:—
"To commence at the mouth of Green's Creek, on the Black River, and extend down six miles on the course South 21° West, and back four miles on the course North, 69° West."

Under this license the plaintiff, by *saisie-revendication*, claimed from the defendant 1800 pieces of White Pine timber, valued at £3000, alleged to have been cut upon the above described location during the existence of the license. To this action the defendant pleaded a general denegation, and the parties having gone to proof, the action was dismissed. The judgment of the Court below was as follows: "Considering that the Black River is the Eastern boundary of the limit described in the declaration, and that the Western boundary of the said limit runs parallel to the general bearing of the Black River at a distance of four miles from the said Eastern boundary, and considering that the timber in this cause seized under and by virtue of the Writ of Revendication, was not made upon the timber berth or limit of the plaintiff, it is adjudged that the action of the plaintiff be dismissed with costs."

MONDELET, J. This is a case which has been the subject of much discussion, and I have the misfortune to differ from my colleagues. I have been much perplexed as to the right interpretation of the description in the license. The majority of the Court are disposed to agree with the defendant in taking the words "down on the course" to mean "down the Black River on the course;" and the word "back" to mean "back from the Black River." If this interpretation be the right one, the timber was not cut on the plaintiff's limit. But I am disposed to take the words in the meaning assigned to them by the plaintiff's witnesses, who speak from

their personal knowledge, and, therefore, I am of opinion to maintain the plaintiff's action.

MEREDITH, J. The whole question turns upon the interpretation to be put upon the license. The case has received a great deal of attention, and after giving it their best consideration, the majority, including the Chief Justice, are of opinion that the judgment is right. I think that a contrary interpretation would deprive the words of their meaning. It was evidently the intention of the Crown Lands Department that the Black River should form the Eastern boundary of the appellant's limit. I may add that the judgment of the Court below clearly meets the justice of the case, for it is plain that the Crown Lands Department did not intend to transfer to the appellant, for a few dollars, timber to the value of £1500.

DRUMMOND, J. I must say that I had great difficulty in interpreting this license, but I think that the interpretation put upon it by the majority of the Court is not only the most just and reasonable, but, as far as I am able to judge from my own experience, the most conformable to the practice and rules of the Crown Lands Department, it being, for obvious reasons, desirable that the limits should be put on the river.

ATLWIN, J., concurred.

DUVAL, C.J., concurred in writing, under 29 & 30 Vic. c. 26, s. 1.

Judgment confirmed, Mondelet, J., dissenting.

P. Ayley, for the Appellant.

J. Colman, for the Respondent.

PREVOST, (defendant in the Court below,) Appellant; and BRIEN *dit* DESROCHERS, (plaintiff in the Court below,) Respondent.

Notice to put a party en demeure—Form of Judgment decreeing performance of obligation.

The plaintiff, lessee, sued his lessor to compel him to fulfil one of the conditions of the lease, under which he was bound to provide materials for keeping the fences in good order. The action was instituted four days after notice in writing had been served upon the lessor, calling upon him to do the work. The judgment condemned the defendant to provide the materials within fifteen days from date of judgment; in default of his so doing, the

plaintiff was authorized to provide the materials at the defendant's expense.

Held, that the notice four days before suit was sufficient. *Held*, also, that the judgment was correct in form; that both parties being before the Court, the delay might properly be made to run from date of judgment instead of from date of service thereof.

This was an appeal from a judgment rendered by *Monk, J.*, in the Circuit Court at Montreal, on the 30th of June, 1865.

The plaintiff leased from the defendant certain land in the Parish of St. Martin, and he brought the present action for the purpose of compelling his lessor to fulfil one of the stipulations of the lease, viz, that the lessor should supply the lessee with the stakes and rails necessary for keeping the fences in good order. The plaintiff alleged that the fences were in a very bad state, that cattle from the neighbourhood strayed over his land and wasted his grain. He further alleged that he had frequently requested the defendant to furnish him with the necessary fencing materials, but that the latter had failed to comply.

The defendant pleaded that he had not been put *en demeure* to furnish the timber in question till four days previous to the institution of the action; and that he should have been allowed sufficient time to procure the fencing materials.

By the judgment of the Circuit Court, the defendant was condemned to furnish the plaintiff with the necessary fencing within fifteen days from the date of the judgment; and in default of his so doing, the plaintiff was authorized to procure the fencing at the defendant's cost. From this judgment the defendant appealed. The principal reason urged for the reversal of the judgment was that the plaintiff, being bound to put him *en demeure* by written notice to provide the fencing materials, should have allowed a reasonable time to intervene between such notice and the institution of the action, whereas only four days had been allowed.

MONDELET, J., dissenting, was of opinion that the judgment should be reversed.

ATLWIN, J., (also dissenting.) The usual course in a case where the judgment calls upon a party to do something, is to make the delay run from the signification of judgment,

instead of which the delay in this instance is from the date of the judgment. Why has the rule been departed from? If ever there was a case in which this rule ought to have been followed, it was this case; for it appears that the protest or notice calling upon the defendant to furnish the fencing was served upon the 20th of April, and the summons in the present suit was served on the 24th of April, only four days after. Now comes another point. Suppose the judgment of the court below is to be executed; the fifteen days are out, and consequently the respondent is authorized to build the fences at the expense of the Appellant. Supposing this to be done, in what way is the respondent to be paid? The judgment can be carried out only by another action, setting out that whereas on such a day and year he obtained a judgment authorizing him to build the fences at the expense of the Appellant, he is entitled to be reimbursed. How is the cost to be ascertained otherwise? Why did not the judgment order the thing to be done *à dire d'experts*, and thus obviate the necessity for another action? It thus appears that there were two mistakes in the judgment: first, in not stating that the work was to be done within fifteen days from the signification, instead of from the date of the judgment; and, secondly, in not stating that the work was to be done *à dire d'experts*. I therefore think that the judgment should be reversed.

MEREDITH, J. This case was first argued in my absence, and the Court was equally divided. I am of opinion that the judgment is unobjectionable, and that it should be confirmed. The first objection to the judgment is that the delay therein given to the defendant counts from the date of the judgment, and not from the signification. But both parties were before the Court, and the Court granted what it conceived to be a reasonable delay. There was not the slightest injustice to either of the parties in this. Then again, as to the cost of procuring the timber, how was the Court to know what it would cost? The value might increase or decrease according to the state of the market. The judgment simply said to the plaintiff, you may get the materials for making the fence, and then you may demand the cost from the other party. It

will be defendant's own fault, if he renders another action necessary, by failing to pay the cost of the material for the fence. The costs must be taxed as in an appealable case of the lowest class, since both parties have proceeded as in an appealable case. No declinatory exception was filed, and the case proceeded to judgment as an appealable case. The costs will therefore be awarded as of the lowest class of appealable cases.

DUVAL, C. J., and DRUMMOND, J., concur. red.

Judgment confirmed; AYLWIN and MONDELET, JJ. dissenting.

Doutre & Doutre, for the Appellant.

Dorton & Dorton, for the Respondent.

FAHRLAND, (plaintiff in the Court below,) Appellant; and RODIER, (defendant in the Court below,) Respondent.

Architect—Violation of Contract.

Held, that an architect who, having agreed with the proprietor to superintend the erection of a house, subsequently engages with the contractor to watch over the contractor's interests for a pecuniary consideration, is thereby guilty of a direct violation of his agreement with the proprietor, and cannot recover under such agreement.

This was an appeal from a judgment of the Circuit Court at Montreal, rendered by *Berthelot*, J., on the 26th of September, 1865, dismissing the plaintiff's action. The facts were these:—The plaintiff, Theophile Fahrland, an architect, was engaged by Charles S. Rodier, the defendant, to superintend the erection of a house in St. Antoine Street west, in the city of Montreal, and it was stipulated that he was to receive \$100 for his services. It appeared from the evidence that sometime after the erection of the building commenced, the plaintiff obtained from the contractor, Mr. Payette, a promise of \$80 for looking after the contractor's interests. The defendant being apprised of this fact, dismissed the plaintiff, and refused to pay him anything for his services. The latter then brought the present action for \$100, the amount for which he undertook to superintend the erection of the defendant's house.

The plea was that the plaintiff had violated

his engagement with the defendant, by undertaking, for \$80, to protect the interests of the contractor; and that he had, in consequence, been justifiably dismissed.

The action was dismissed in the Court below, on the ground that the proved engagement with the contractor was a direct violation of the plaintiff's previous undertaking to superintend the building in the interest of the proprietor.

The plaintiff appealed from this judgment. His version of the affair, as stated in his answers on *faits et articles*, was as follows:— That the defendant first engaged him without any rate of remuneration being agreed upon, with the understanding that he, the defendant, and the contractor were to bear the expense equally. That as the tariff rate for architects is five per cent, in the absence of any agreement, the plaintiff's remuneration would have been \$600, on £3000, the cost of the building. But about the time the work was commenced, the defendant induced him to stipulate to do the work for \$100, to be paid by the defendant, leaving the plaintiff at liberty, as he pretended, to make his own arrangements with the contractor. That he subsequently agreed with the contractor for \$80; that the defendant was aware of this all along, and merely made use of this fact as a pretext to evade payment of the \$100, when the house was nearly finished, and the services of an architect were no longer required.

DRUMMOND, J. We are of opinion that the judgment in this case must be confirmed. Mr. Fahrland was in the position of an advocate who accepts a retainer from both the plaintiff and the defendant. The interests of the proprietor and of the contractor are conflicting; and the architect could not serve both at the same time. We have the assent of the Chief Justice in this case.

MEREDITH, and MONDELET, JJ., concurred. Judgment confirmed.

Doutre & Doutre, for the Appellant.

J. A. A. Belle, for the Respondent.

September 8th.

OWLER, *et al.*, (defendants in the Court below) Appellants; and Dame HENRIETTE

MOREAU *et vir.*, (plaintiffs in the Court below) Respondents.

Lease—Clause prohibiting subletting—Acquiescence—Exception of Guarantee.

The plaintiff's *auteur* leased certain premises with a clause in the lease, that the premises should not be sublet without his consent in writing. The lessee did sublet the premises, and the lessor's agent collected the rent from the sub-tenants for more than a year, without making any objection to the sublease. The heirs of the lessor subsequently sold the property to the plaintiff, and assigned to her their right to have the lease set aside, but without any guarantee. The assignee having brought an action to resiliate the lease:—

Held, that the lessor by receiving the rent from the sub-tenants for more than the period of one year, tacitly sanctioned and acquiesced in the subletting, and abandoned his right to oust the lessee. That the lessor therefore could not confer upon the assignee any right to oust the lessee. That to any action arising out of a violation of the lease subsequent to the assignment, the exception of guarantee could be opposed by the lessee, and as the assignment was stipulated to be without any guarantee, the assignee was bound in law in the same way as his *auteurs* were bound.

This was an appeal from a judgment of the Superior Court sitting as a Court of Review at Montreal, on the 30th of April, 1866, reversing a judgment of the Superior Court rendered by Smith, J., on the 14th of April, 1866.

The action was brought under the Lessor and Lessees' act, to eject the Appellant, William Owler, in consequence of his having sublet the premises leased, contrary to a written clause in the lease, without having first obtained the lessor's consent in writing.

The judgment rendered by Smith, J., in the Superior Court, dismissed the action, on the ground that the subletting had been tacitly sanctioned by the lessor.

The facts of the case sufficiently appear from the following note of the judgment in Review (BADGLEY, BERTHELOT, and SMITH, JJ.)

SMITH, J. This is an action of ejectment. In October, 1862, a lease was entered into by the late George Desbarats with the defendant, Owler, of certain premises at the corner of St. Gabriel and St. Thérèse Streets, known as the Odd Fellows' Hall, including the basement, for the term of five years. In this lease

there was a stipulation that Owler should not transfer his interest in the lease without the consent in writing of the lessor. Owler entered into possession in May, 1863, and continued in possession until February, 1864, when he sublet part of the premises to one Pierre Cérat. Mr. Desbarats died in October, 1864. In April, 1865, Owler sublet the rest of the house to one Dorion. After the death of Mr. Desbarats the property was, in 1866, sold by the heirs to the plaintiff. In the deed of sale it was stated that the vendors assigned over to the vendee any right to eject Owler that the heirs themselves possessed. They took care however, not to guarantee anything. It appears, therefore, that the two leases, which were made anterior to the sale, were known both to the vendor and to the vendee. For surely it cannot be pretended that the parties can plead ignorance of these transactions, in the face of the stipulation between them that the vendee should have whatever right the heirs had to eject Owler, and that this right was to be exercised at the vendee's own risk. Under these circumstances how does the law apply? By the common law the lessee is entitled to use the property leased for any purpose that he pleases, so long as he does not commit waste or render the position of the lessor less favourable than it was. Stipulations against subletting, and so forth, are made in favour of the lessor. In this instance the lease contained a clause that the lessee should not assign his lease, and it is an alleged violation of this stipulation that gives rise to the action of ejectment. What was the intention of the lessor in stipulating that his tenant should not assign the lease? He evidently meant that the lease was not to be assigned without his permission; but the moment that the stipulation was waived by the consent of the landlord, then the common law came in, and the parties stood in the same position as though the stipulation was not in the lease. The stipulation as to a consent in writing was a privilege stipulated in favour of the landlord; but he might say if he chose, that he did not want proof in writing. He was the party in whose favour consent was stipulated, and he might dispense with the necessity for such consent. See Dictionnaire

Dalloz, under the word *acquiescement*. I think that there is an *acquiescement* clearly shown in this case. The rent was paid to the knowledge of the proprietors. The heirs Desbarats had only the same right that Mr. Desbarats himself had. If he chose to say: "Never mind the consent in writing; pay me the rent, and it will be all right," this was a clear acquiescence. The rent has been paid for years with the perfect knowledge of the agents for the property. Mr. Desbarats never gave a written consent, but he gave a tacit consent which, to all intents and purposes, is equivalent. Under these circumstances, I regret that I cannot concur in the judgment about to be rendered.

BETHBLOT, J. I am of opinion that the proprietor did not consent to the sub-leasing of the premises. Mr. Stodart, the agent, denies that he had any power from the Desbarats' estate to consent to the sub-leasing. This case differs from that of *Cordner v. Mitchell*, for in that case there was something in writing which might be considered equivalent to a commencement of proof of a written consent; but here there is nothing of the kind. The plaintiff's action in ejectment should have been maintained.

BADGLEY, J. My opinion is that which I formed when I heard the case at the bar. It is necessary to keep in mind the dates. The landlord leased with a strict stipulation in writing that the tenant should not sublet. There is no rule of this kind in the common law to prohibit subletting. The lease was made to Owler on the 8th of October, 1862, for five years from the 1st of May, 1863. On the 17th Feb., 1864, Owler let the basement story of the house to a man named Cérat. We know that so long as Owler did not dispossess himself of the house the law protected the arrangement. Cérat was the tenant of Owler. There was no breach of the contract here, because Owler still remained in actual possession of the premises. Then on the 8th of April, 1865, Owler sub-let the whole remaining portion of the house to one Joseph Dorion, this arrangement to take effect on the 1st May, 1865. The fact of his sub-letting the whole of the premises deprived him of the protection of the law, because he had no longer foothold in

the premises. The contract was absolutely broken by this lease to Dorion. The sale of the property by Desbarats took place on the 19th of Feb., 1866. The terms of the deed show that the parties to it were aware that the defendants were in possession as sub-tenants, but the purchasers by the contract were to have the privilege of ousting them when they pleased. Their knowledge of the sub-tenant's possession was no acquiescence, because they reserved their right to oust them. The only question then is this, did the vendors acquiesce? Did they change the condition of the contract by any act on their part? As I have already stated, there was no infringement of the contract by the lease to Cérat; the breach was the lease to Dorion. Stodart was the mere receiving agent, or collector, of the landlord: he could not bind the landlord in any way, and I can see no acquiescence in the case.

The evidence, it must be remarked, has been taken in a very irregular way. Finlay, who pretends to be the agent of Owler, has been allowed to be examined by a series of interrogatories to which he has answered, yes, yes. On his cross-examination it appeared that he knew nothing about the matter, except that he heard Stodart say nothing against the sub-letting, and this is called an acquiescence! More than this was necessary. We must come to the old rule *nemo facile presumitur renunciare*. Under the circumstances, the judgment of the Court below was wrong, and it must be reversed.

From this judgment the defendants appealed, submitting that there had been a sufficient acquiescence.

AYLWIN, J. We are fully of opinion that the judgment of the original Court is right, and that the judgment of the Court of Review is wrong. The judgment of this Court will therefore be in the following terms: "Considering that the respondent has proved by legal evidence, that by the deed of acquisition made by the said Respondent, she did acquire from the estate of the late George Desbarats, the real property therein set forth, and now in the possession of the Appellant Owler and

others, mentioned in the declaration in this cause, and that in and by the said deed the said plaintiff did receive also a transfer of the lease by the said estate Desbarats, together with all the rights and privileges of the said estate Desbarats, under the said lease to the said Owler, to exercise all the rights of the said estate Desbarats, in respect thereof; and all rights of the said estate Desbarats to expel the said Owler, in case he had violated the clauses of the *bail*, in respect of having sub-let the said premises.

And further, considering that the said estate of the said George Desbarats, had allowed and tolerated the sub-letting of the said premises by the said Owler, by tacitly sanctioning the said sub-lease, by receiving for a period of more than one year the rent of the said premises without protest, and with a full knowledge of the fact that the said Owler had sub-let the said premises, and had for the period of more than one year approved tacitly thereof; and that by reason thereof he had acquiesced in the said sub-letting, and had thereby abandoned all rights to oust the said Owler from the possession of the property, which became a *droit acquis* in favor of the said Owler; and further, considering that the said estate of Desbarats, could not in law give the said purchaser, to wit, the said plaintiff, any such right, as the same had been abandoned by the said estate, and which was well known to the said purchaser, and considering that by the common law, the rights under the said lease could only accrue to the said plaintiff after she had purchased the same, and for any further violation of the conditions of the said lease and deed, the exception of guarantee could therefore be opposed to the said plaintiff, by the said Owler, and as the said estate Desbarats has stipulated a clause that the transfer of the lease in that respect is *sans aucune garantie*, the said plaintiff is bound in law, in the same way as the *auteurs* of the said plaintiff are bound, &c., the Court reverses the judgment of the Court of Review and confirms that of the Superior Court."

DRUMMOND, J. The only difference between our judgment and that of the Superior Court is with reference to the period to which the acquiescence dates back. The Superior Court

was of opinion that the rent had been received from the sub-tenant, with the consent of the proprietor, for more than three years. We are of opinion that this should be reduced to one year.

MONDELET, J., and JOHNSON, J., *ad hoc*, concurred.

Judgment reversed.

McCoy & McMahon, for the Appellant.

Moreau, Ousimet & Chapleau, for the Respondents.

REGINA v. THOMAS MURRAY.

Habeas Corpus—Substitution of a Formal for an Informal Warrant.

Held, that a formal warrant of commitment may be substituted for an informal one; and that the substitution need not be referred to in words in the subsequent warrant, since so long as there is a good warrant authorizing the detention of a prisoner, it does not matter how many bad warrants there are.

Quere as to *certiorari* to Queen's Bench.

The writ of *habeas corpus* had been ordered to issue, and the case now came up on the jailer's return. The petition of the prisoner, Thomas Murray, set forth that on the 6th of July last, he had been imprisoned in the common gaol under and by virtue of a warrant of commitment, before Messrs. Brehaut and Beaudry, which warrant alleged that the petitioner was convicted, "for that he, on the 6th of May last, not being an enlisted soldier, did unlawfully, by words and other means, go about to and endeavoured to persuade Edward Adams, an enlisted soldier in Her Majesty's service, to desert and leave such service against the form of the statute in such case made and provided;" and the petitioner was condemned to pay a fine of £40 Stg. and \$6 costs, and also to be imprisoned for six months, and for so long afterwards as the said penalty and costs should remain unpaid.

The petition proceeded to state, that on the 14th of July last, the petitioner presented to the judges of the Superior Court a petition, setting forth his imprisonment, and praying that the warrant of commitment be quashed and set aside. The reasons urged in support of the petition mainly consisted in the fact, that the warrant of commitment did not state upon what day

the petitioner was convicted, and hence there was no time specified from which the imprisonment was to run. The application having been made before Monk, J., the writ was ordered to issue, returnable before him on the 18th of July. On the 17th of July, before the service of the writ on the jailer, another warrant of commitment was left at the gaol, in which the omission of date was rectified, and this warrant was returned by the jailer with the first warrant of commitment, as a cause of the petitioner's detention, whereupon the petition was rejected.

The prisoner now renewed his application to this Court, alleging that he was imprisoned under two warrants, each committing him for six months, and each condemning him to pay a penalty of £40 and costs. The petition also set out that the second warrant of commitment was bad, because it was not stated therein that it had been substituted for the original warrant.

BADGLEY, J. The writ was returned yesterday, and the return of the jailer, stating the causes of the prisoner's detention, has brought before the Court the two warrants of commitment, under which the jailer says he is detained. Both warrants bear date the same day, and specify the same offence. One ground assigned by the prisoner's counsel is, that there is an informality in the commitment. The second ground is that the two warrants being of the same date, and for the same charge, the jailer would not know on which to detain the prisoner, and therefore his detention is illegal.

With reference to the first point, we are of opinion that the warrant is regular and in due form. The words of the statute have been followed. The charge is enticing a soldier in Her Majesty's service to desert, and the words used in the commitment do not render the charge so uncertain as that the prisoner did not know what he was charged with.

The objection then rests upon the other ground—that there are two warrants. We have been referred to the case of *Re Elmy and Sawyer*, (1st Adolphus & Ellis, p. 843.) In that case the prisoner was convicted in a penalty under an act against smuggling. The act empowered justices to amend any such

conviction or warrant of commitment, whether before or after conviction. Four days after the committal, the warrant (which was defective in point of law) was withdrawn from the jailer's possession, and another warrant substituted, it did not appear by whom. The second warrant was of the same date, and signed and sealed by the same justices as the first, and did not materially vary from it. Application was made for a writ of *habeas corpus*, and a *certiorari* was at the same time issued, to remove into the court the examinations, conviction and other proceedings. It was held in that case that the court could not presume, either from the facts returned or from the warrants, that the second warrant was substituted by the justices as an amendment of the first, in pursuance of the authority given the justices by the act, and the prisoner was discharged. But the judges stated that under the circumstances of the case, the magistrates being authorized to substitute a good warrant for a bad one, the substituted warrant would have been a good one, if it had contained the information that it was so substituted. But this was omitted, and the substituted warrant, moreover, contained new facts. The judges accordingly discharged the prisoner. This was the case relied on by Mr. *Dealin*. But we have another case, *Re Walker et al.*, New Sessions Cases p. 182. Four individuals were committed for a certain offence; a writ of *habeas corpus* was taken out, and the jailer returned that A. and B. were detained in custody under a warrant against them, dated, &c., and C. and D. under a similar warrant of same date. That afterwards whilst they were in custody, four other warrants against A. B. C. and D. individually, for their commitment respectively, were put into his hands. It was attempted to be set up that the original warrants being informal, the new warrants against A. B. C. and D. individually could not be substituted, because though as a general proposition a formal warrant may be substituted for an informal one, the former must be withdrawn and the substitution referred to by words in the subsequent ones. *Re Elmy, supra*. The prisoners should, therefore, be discharged. But it was answered, that if there is a good warrant autho-

rizing the detention of a prisoner, it does not matter how many bad warrants there are: a justice may, pending an action, even on the morning of the trial, draw up a good conviction. The court held that the formal warrants were properly substituted for the informal ones, and being commitments were good on the return sent. The application was rejected.

We think, therefore, the return in this case is a good return. Whatever the first warrant might have been, the second warrant is a good warrant, and the return is good under the circumstances of the case.

With respect to *certiorari* to this Court, individually, I think the right of appeal to the Queen's Bench on *certiorari* has not been taken away by the statute which affects civil cases only. I think that the Court of Queen's Bench, sitting on the criminal side, has not been deprived of any power of issuing *certiorari*. I mention this incidentally only, as the *certiorari* has been spoken of, but it has no connection with the return upon this writ. We have come to the conclusion that the *habeas corpus* must be discharged.

MONDELET, J. If the jailer should not understand that the second warrant is a substituted one, and at the expiration of the first term of commitment, should not discharge the prisoner, then it would be time enough to apply for a *habeas corpus*, and it would be immediately granted. I agree with the remarks of Mr. Justice Badgley as to the writ of *certiorari*.

AYLWIN, J. I concur in the judgment given by the judge in the Superior Court. We are bound to assume, till the contrary has been shown, that there has been a good conviction, and that the magistrate has done everything that was required by law. The petitioner takes nothing by his motion.

DRUMMOND, J., concurred.

T. K. Ramsay, for the Crown.

B. Dealin, for the Petitioner.

COURT OF REVIEW.

April 30.

DESJARDINS v. TASSE.

Compensation.

Held, that an account for board, where the debt is easily proved, is a debt *claire et liquide*,

and such as may be offered in compensation to a debt under an obligation.

This was a case from the Circuit Court, Montreal, inscribed for review by the plaintiff. The action was brought by the plaintiff as the legatee of his deceased wife, Theotiste Tassé, claiming the balance due under an obligation for \$100, made by the defendant in favour of Theotiste Tassé in 1839. The defendant pleaded that the debt was compensated by an account which he had against Theotiste Tassé for board while she was a girl. It appeared that Theotiste Tassé, who was the defendant's niece, had resided for some time in her uncle's house. This was previous to the date of the obligation.

SMITH, J. The question comes up in this case, whether the debt offered in compensation is *claire et liquide*, and such as can be offered in compensation. The law is that compensation can take place in every case in which the sum due is easily settled. The debt due on the obligation is *claire et liquide*. If the debt due on the account is easily proveable, it can be offered in compensation. In this case, I think, the debt is easily proveable, and nearly of the same nature as the plaintiff's claim. Upon this point, therefore, we are against the plaintiff. The only point remaining is whether the debt is proved. To establish this there are three witnesses, who prove that Theotiste Tassé was indebted to her uncle, the defendant, in the sum of £10, for attendance and board. The Court has made a calculation of the amount to be deducted, and judgment is rendered in the plaintiff's favour for the balance due on the obligation with interest, equal to £8; the costs to be those of an action for £15.

MONK, J. This judgment, it must be remarked, is based chiefly on the equity of the case; for Paquette, the person present when the arrangement was made respecting board, and who would have given the best evidence that could have been adduced, has not been examined at all.

BERTHELOT, J., concurred.

Judgment reformed.

M. Garault, for the Plaintiff.

Loranger & Loranger, for the Defendant.

SUPERIOR COURT.

May 21.

DUBORD v. LANCTOT.

Information against City Councillor—Necessary allegations—Amendment of Information.

Held, that in an information for the purpose of testing the right of a City Councillor to exercise the office, the petitioner must allege that he is "a citizen qualified to vote at the election of Councillor for some ward of the city," and that it is not sufficient for the petitioner (in this case the unsuccessful candidate) to allege his own qualification for the office of Councillor.

The petitioner, having asked leave to amend the information, by inserting an allegation of his "qualification as a voter:"—

Held, that such amendment could not be allowed, as it would change the substance of the information, and be equivalent to a new information, requiring the issue of a new writ.

BADGLEY, J. The information, or *requête libellée*, in this cause has been presented by the unsuccessful candidate for the office of Councillor for the East Ward of this city, at the civic election for that office, held in February last. The statement of the proceedings had previous to and at the election, has not been complained of, nor the seating of the successful candidate, Mr. Lanctot, upon the ascertainment of the actual votes given, the latter having received 112 votes, and the petitioner 108. The information admits these facts, and also that Mr. Lanctot has satisfied the provisions of the City Charter in taking the oaths required by law, and consequently taken his seat in the City Council, but it objects against him that at the time of his election he was not qualified for election to the office of Councillor, as not being possessed of real or personal estate, or both, within the city, of the value of £500, after payment or deduction of his just debts. It is only necessary to add, as regards this part of the case, that the petitioner has set out in his information his own qualification for the office of Councillor as required by the Charter, which has not been contradicted.

Upon the petition required, presented in this case, supported by affidavit, a writ was issued by the Court, formally requiring Mr. Lanctot to appear and answer to the information, *Requête libellée*, against him, and to show by what authority he exercised or attempted to

exercise the office of Councillor. The writ was issued upon the judgment of this Court to that effect, and I do not, therefore, feel myself justified in adverting to its validity, the more particularly as this now pleaded exception in law has gone beyond the mere issue of the writ. It is possible, however, that after examination of the *Requête* and supporting affidavits, and upon consideration of the section of the Charter applicable to the matter, I might have had some doubt upon the granting of the application. Upon this formal matter, however, I am not called upon to determine, because Mr. Lanctot having pleaded to the information, *Requête*, it is upon his plea in law, or demurrer to the *Requête*, that the contention between the parties has been submitted. It is unnecessary to advert to the two first grounds of legal objection, having reference to the required affidavit in support of the information, but such as the produced affidavits were, they were sufficient for its support, such as it was. The third ground, however, is important, inasmuch as it charges that the information, *Requête*, does not allege that the petitioner was "a citizen of the city of Montreal, qualified to vote at the election of Councillor for some ward of the city." To this objection the petitioner has given the general answer of the sufficiency in law of the allegations contained in his information to obtain the conclusions thereof.

By the 8th section of the 14th and 15th Vic. c. 128, the qualification for a Councillor is fixed, namely, that he shall have been a resident householder within the city for a year next before the election, and also seized and possessed to his own use of real and personal estate, or both, within the said city, free of debts, of the value of £500; and he is also required by the 9th section, to be a natural born or naturalized subject. As already observed, the petitioner has fully and distinctly stated and alleged this his own qualification in his information.

In connection with this part of the case it is necessary to state that the qualification for the civic voters is settled by the 23rd Vic., c. 72, in the 4th clause of that statute, which provides for their qualification, 1st, as owners of real property within the city of the assessed value of \$300 and upwards, or of assessed yearly

value of \$30 or upwards; 2nd, as tenants or occupants of dwelling houses in the ward for which the election is held, of the same assessed values as above, but requiring the tenant to have been in possession on the then next previous first of January, or a resident householder in the city from at least the next previous first of May, &c.; and 3rd, tenants of warehouses, counting houses, &c., with the special proviso applicable to each, *that none of them shall be entitled to vote at any such election unless he shall, previously to the first of January next before such election, have paid all the civic taxes due and payable by him.* It is objected by Mr. Lanctot that the petitioner has properly stated his qualification for the office of Councillor for which he was a candidate, but that that qualification gives him no power to apply under the statute as he has done here; that he has not stated the voter's qualification, which alone and of itself was essential to justify his application, under the 27th sec. of the 14th and 15th Vic., whereby alone as a qualified voter he can legally question Mr. Lanctot's office as Councillor.

The objection is quite correct in fact, inasmuch as the information alleged the Councillor's qualification alone, and does not allege his qualification as a voter.

Now, the 27th section of the 14th and 15th Vic., under which this proceeding has been adopted, specially provides that "to facilitate the decision of cases in which the right of any Corporation officer may be called in question, the Superior Court in term shall, on the information, *Requête libellée*, of any citizen qualified to vote at the election of Councillor, supported by affidavit, &c., and complaining that any person exercises the office of Mayor, Alderman, or Councillor, have power to try and adjudge upon the right of the person so complained of to exercise the office in question, and to make such order, and cause such writ of mandamus to be addressed to the Mayor, Aldermen and Citizens of Montreal, in fact to the Corporation, as to right and justice may appertain, which order or mandamus shall be obeyed by the Corporation and by all other parties, without appeal therefrom."

The proceedings therefore, provided for in this section of the Charter have reference ma-

nifestly to the legal tenure of office of the officer complained of, namely and solely the *right* by which he exercises that office, and seems to convey express judicial authority to the Court, as in this case, to try and adjudge by what right Mr. Lancot exercises the office of Councillor. This provision does not constitute the Superior Court into a tribunal, committee or otherwise, to decide upon the claims of the rival candidates for the civic office in question, as is done in election contests of members of the Assembly before the legislative bodies, where one candidate may be unseated and another seated in his place; on the contrary, the jurisdiction of the Court is strictly legal, and is restricted to try and adjudge upon the *right of the person complained of* to hold and exercise his office. In the discharge of this judicial duty, it is expressly provided by the statute that the preliminary as well as substantial interest of the complainant, in setting the statute in motion against the officer, lies in his being a *qualified voter*: "Any citizen qualified to vote," the law in no part enabling the losing candidate, simply as such, or under his special qualification for election as Councillor, merely, to compel the action of the Court, upon the provision of the statute. As already observed, the duty cast upon the Court is not to decide upon the result of the election as to which of the rival candidates shall be seated in the office, but to adjudge upon the right of the officer *de facto* to exercise his office, if he shall have been found by the Revisors to have received the majority of votes at the election. In this case, the information, or *requête*, is by the unsuccessful candidate for the office of Councillor, as such, and upon his Councillor's qualification only, and not as a qualified voter; therefore not coming within the terms of the statute, which would justify the action of this Court, the demurrer or plea in law must be maintained, and the *requête* dismissed with costs against the petitioner.

After the judgment had been rendered, the complainant's counsel moved the Court to permit the information or *Requête* to be amended by inserting the required *qualification as a voter*, but this was refused upon the ground that the amendment would change the substance of the information altogether, and would

in effect be equivalent to a new *Requête*, which would not then be supported by the affidavits produced, and which would necessarily require the adoption of new proceedings and the issue of a new writ, the present writ having issued upon the allegations contained in the *Requête* above, which did not set forth the only qualification, *that of a voter*, upon which it could have issued.

Abbott & Carter, for the Petitioner.

W. Lawrie, for the Defendant.

RECENT ENGLISH DECISIONS.

CHANCERY APPEALS.

Light—Lateral Obstruction—Town.

Where a house is in a populous town, the Court will take that fact into consideration, in estimating the damage done by obstructing an ancient light. The Court will not restrain the erection of a building merely because it deprives an ancient window of some portion of light; but will do so when the obstruction is such as to interfere with the ordinary occupations of life. A lateral obstruction may be such a nuisance as to be restrained. *Clarke v. Clark*, Ch. Ap. 16. The plaintiff in this case was the owner of the house, 28, Park Street, Bristol. The defendant was the owner of No. 27. At the back of the plaintiff's house was a room with a large window looking to the south-west into the garden. The wall between the gardens of the houses was on the left hand side of the window, about four feet from it, and about eleven feet high, running in a direction nearly perpendicular to the window. The defendant, in September, 1864, began to erect in his garden some buildings for photography, running parallel to the garden wall, about three feet from it, and from four feet six inches to eleven feet above the wall. These buildings, though not opposite the window, were thus nearly due south of it, and obstructed, to some extent, the light and sun during the winter months. The plaintiff having obtained a decree for an injunction, the defendant appealed, and the Lord Chancellor sustained the appeal and dismissed the bill. The following are some extracts from his Lordship's judgment:—"The question is, whether there has been such an interference with the light and air reaching the plaintiff's

house as to cause material annoyance to those who occupy it. . . . Much must turn on the nature and locality of the windows, the supply of light to which has been interfered with. Persons who live in towns, and more especially in large cities, cannot expect to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country. . . .

That the effect of the defendant's building is to render the plaintiff's room less cheerful, especially during the winter months, I do not doubt. The direct rays of the sun do not now reach it, during that period of the year, for more than about forty minutes in the day, on an average, instead of about two hours and a half. But I cannot think that this is such an obstruction of light as to amount to a nuisance."

Patent—Joint Grantees.—Where a patent for an invention is granted to two or more persons in the usual form, each one may use the invention without the consent of the others. *Mathers v. Green*, Ch. Ap. 29. Lord Cranworth, in reversing the decision of the Master of the Rolls, said: "Is there then any implied contract, where two or more persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else to compel the other patentee to risk his skill and capital in the use of the invention on the terms of being accountable for half the profit, if profit should be made, without being able to call on his co-patentee for contribution if there should be loss." [The judgment does not appear to have touched on the rights of joint patentees to the profits made by granting licenses; but we apprehend that, in the absence of express contract, such profits must be equally divided.—Ed. L. J.]

Statute of Frauds—Part Performance.—A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the exe-

cution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate:—*Held*, that this constituted a sufficient part performance of the agreement to take the case out of the *Statute of Frauds*, and specific performance was decreed. *Nunn v. Fabian*, Ch. Ap. 35. In this case the lease had actually been engrossed, and several appointments had been made to execute it; and on the last day that an appointment had been made, the proprietor of the property died suddenly. The draft of the lease, in the handwriting of a clerk of deceased's solicitor, was produced. The Lord Chancellor, in delivering judgment, relied chiefly upon the fact that the tenant had paid a quarter's rent at the increased rate stipulated in the lease, and this he thought was a clear part performance.

Copyright—Alien—Temporary Residence within the Realm—Colony—Canada.—An alien friend residing temporarily in any part of the British dominions, and during the time of such residence publishing in England a work, of which he is the author, acquires a copyright under the 5 & 6 Vict. c. 45. And this is the case, although he may be residing in a British colony, with an independent legislature, under the laws of which he is not entitled to copyright. *Low v. Routledge*, Ch. Ap. 42. This was a case of considerable interest. Maria Cummins, a native of the United States, being desirous of acquiring a British copyright for a work of hers, called "Haunted Hearts," transmitted the manuscript to Sampson Low & Co., for publication by them; it having been arranged that she should, prior to such publication, go to Montreal, and continue there until and during the publication of the work in England. Maria Cummins accordingly went to Montreal, and was living there at the time of the publication of "Haunted Hearts" in London, on the 23rd May, 1864. The work was in two volumes, price 16s. In the same month, Routledge & Co., the defendants, brought out a cheap edition of the same work, price 2s., and the plaintiffs filed a bill to restrain the violation of the copyright. It was admitted that the author had acquired no copyright under the *Canadian Copyright Act* (4 & 5 Vict. c. 61), but it was contended by the plaintiffs' counsel, that the Canadian Acts

could not affect her rights under the imperial law. The *Canada Government Act*. (3 & 4 Vict. c. 35, s. 3) enacted that the Canadian Legislature shall have no power to make any laws "repugnant to any Act of Parliament made or to be made." On behalf of the defendants, it was urged that "the expression referred to in the *Canada Government Act*, means that the Canadian Legislature shall make no law repugnant to any imperial Act in existence at the time when such law might be made; but the Canadian Legislature could not be supposed to foresee what Act the Imperial Legislature might pass at any future time. The *Copyright Act* (5 & 6 Vict. c. 45) cannot by a side wind repeal the *Canadian Copyright Act*. The general words 'all colonies,' in the 2nd section of the English Act, do not include such colonies as have an independent legislature." Sir G. J. Turner, L.J., in delivering judgment, disposed of this argument as follows:—"A more plausible argument on the part of the defendants was this: It was said that by a Canadian statute an alien coming into Canada for the purpose of publishing a work, and publishing it there, would not be entitled to copyright in the work so published; and it was insisted that an alien coming into Canada could acquire only such rights as are given by the law of Canada, and could not, therefore, be entitled to copyright; and some cases were cited in support of this argument. On examining these cases, however, they will be found to decide no more than this:—that as to aliens coming within the British Colonies, their civil rights within the colonies depend upon the colonial laws; they decide nothing as to the civil rights of aliens beyond the limits of the colonies. This argument on the part of the defendants is, in truth, founded on a confusion between the rights of an alien as a subject of the colony, and his rights as a subject of the Crown. Every alien coming into a British colony becomes temporarily a subject of the Crown—bound by, subject to, and entitled to the benefit of the laws which affect all British subjects. He has obligations and rights both within and beyond the colony into which he comes. As to his rights within the colony he may well be bound by its laws, but as to his rights beyond the colony he cannot

be affected by those laws; for the laws of a colony cannot extend beyond its territorial limits."

Sale—Nuisance.—H. sold land to persons who were described in the conveyance as copper-smelters and co-partners, and as purchasing for the purposes of the partnership; and who, between the contract and conveyance, nearly completed smelting works on the lands. H. subsequently sold neighbouring land to the Plaintiff, who bought with full notice of the existence of the copper-works. The plaintiff recovered judgment at law, with substantial damages, for injury done to this land by the smoke of the works, and then filed his bill for an injunction. *V. C. Wood* held that the plaintiff's *having come to the nuisance*, did not disentitle him to equitable relief, and that H.'s having sold the site of the works, *with full knowledge that such works would be erected on it*, did not disentitle him, or those claiming under him, to complain of any nuisance which the works might occasion, and his Honour granted an interlocutory injunction: *Held*, on appeal, that the injunction had been rightly granted. *Tipping v. St. Helen's Smelting Co.* Ch. Ap. 66.

Application for Shares—Minute Book—Entry.—A director of a company signed the articles of association as a holder of twenty-five shares, but applied for fifty shares, which was the qualification of a director under the articles. No allotment of shares was made: *Held*, varying the decision of the Master of the Rolls, that he was a contributory for twenty-five shares only.

A resolution was passed at a meeting of directors, reciting a list of shareholders, in which the Appellant, who was a director, was put down for fifty shares. The Appellant was not present at the meeting, and denied all knowledge of the resolution, although he was present at the next subsequent meeting:—*Held*, in the absence of proof that the minutes of the previous meeting were duly read and confirmed at the subsequent meeting (which it appeared was not always done), that the Appellant was not bound by the insertion of his name for fifty shares. *Tothill's Case, In re Llanharry Hematite Iron Co.* Ch. Ap. 85.

Demurrer—Res Judicata.—Demurrer will not lie to a bill on the ground of *res judicata*, unless it avers that everything in controversy as the foundation of relief was also in controversy in the former suit. CRANWORTH, L.C., said: "I could not find, upon looking at all the authorities to which I had recourse, an instance of a demurrer to a bill upon such a ground as a former dismissal. I take it to be so for this reason, that it never can happen without averments, which are not likely to be introduced, that everything that was in controversy in the second suit as the foundation for the relief sought, was also in controversy in the first. That is a very clear principle, and upon that principle I think the demurrer must be overruled." *Moss v. Anglo-Egyptian Navigation Co. Ch. Ap. p. 108.*

Act of Bankruptcy—Fraudulent Assignment.—An assignment by a trader of all his property, as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within the meaning of the Bankruptcy Acts. In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors. Such an assignment cannot be an act of bankruptcy unless it is also void as being fraudulent.

Lord Cranworth observed: "This is an important general question. I do not think there has been any act of bankruptcy here. It appears that Mrs. Colemere, the alleged bankrupt, was carrying on a small business in the beginning of this year. She was no doubt in embarrassed circumstances. How far that was known to others does not appear very clearly, but she applied in the month of April to her solicitor, Mr. Salter, to try and effect through him a loan of money. Mr. Salter had in his hands £200 belonging to another client of his of the name of Carsley, for the purpose of putting it out at interest; and in order to further the views of the client who wanted to borrow, and at the same time the views of his client who wanted to lend, Mr. Salter agreed that he would invest £150, part of Carsley's money, on loan to Mrs. Colemere, upon an assignment to him of all her stock-in-trade, and all her property, by way of security.

Five weeks afterwards, the stock and goodwill of Mrs. Colemere were sold to another person, and she was manifestly insolvent. The Act, 12 and 13 Vic. c. 106, s. 67, says, that if any trader shall make, or cause to be made, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, he shall be deemed to have committed an act of bankruptcy. This was a very old enactment, repeated from time to time in the successive Acts; and it was held that any assignment made by a trader of all his goods was fraudulent, because it prevented him from carrying on his trade, and so, that whenever a trader had assigned all his goods, he had committed an act of bankruptcy. But to this general doctrine a very reasonable qualification has been introduced, that the assignment to be fraudulent must be an assignment, not for the purpose of raising money to enable the trader to go on with his trade, but for the purpose of paying some favored creditor, or making some payments to all his creditors, otherwise than through the Court of Bankruptcy. In either of these cases it is an act of bankruptcy. But if it is for the purpose of enabling him to raise money to go on with his trade, that cannot be called a fraudulent act, as tending to defeat and delay his creditors, for it probably is, or may be, the wisest step he could take to promote the interest of his creditors. Now, in this case I think upon the facts I must come to this conclusion—certainly that Mr. Carsley did not know that he was lending this money for any fraudulent purpose of delaying creditors; and I think I must also come to the conclusion that neither was that known to Mr. Salter, who was his solicitor, and also the solicitor of Mrs. Colemere, the trader. It was said that what was known to the client must have been known to the solicitor. That must be taken with great qualification. Certainly, when a solicitor is acting for both parties, facts that are important to the matter in hand, and which are known to the solicitor, may be said to be known to both parties; but it is carrying that proposition a great deal further to say that all facts known to the client are to be taken as known to the solicitor; and to say that a fact not connected with the loan of the money, a

mere intention in the mind of the borrower, if it existed, as to how she intended to dispose of the money which she borrowed when she got it, should be known to the solicitor, seems to me to be preposterous. I assent to the doctrine as laid down by Mr Justice Willes, which appears to me to be very correctly put: 'A person dealing *bona fide* with the bankrupt would be safe. Unless he knows, or from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat and delay the creditors, the deed cannot be impeached.'" *In re Colemere*, Ch. Ap. 128.

EQUITY CASES.

Bill of Exchange—Indorsement "in need"—Notice of Dishonour.—A bill of exchange, the drawer and acceptor of which became bankrupt before it fell due, was indorsed by the *Leeds Banking Company* to Messrs. P., of Liverpool, payable "in need" at a bank in London. When it fell due, it was presented by Messrs. P.'s agent in London at the banks notified for payment by the acceptor and indorser, and dishonoured at both banks. Messrs. P.'s agent then sent notice of the dishonour, by post, to Messrs. P., at Liverpool; and they, by post, sent notice to the liquidator of the *Leeds Banking Company*, which was being wound up. Upon claim against the *Leeds Banking Company*, under the winding-up, in respect of the bill:

Held, that the indorsement "in need" constituted the bank notified "in need" agents of the indorsers for payment only, and not agents for notice of dishonour generally; and therefore that notice to them of dishonour by the acceptor was not notice to the indorsers. That presentation for payment to an indorser is not *per se* notice of dishonour by the acceptor; and, that the rule allowing a day for each step in presentation and notice applies only as between the parties to a bill, and does not give a day for communication between the agent of the holder of a bill and such holder who resides at a distance; and, therefore, the Court disallowed the claim. *In re Leeds Banking Co.* Eq. 1.

Trustee—Liability—Fraud—Solicitor.—

A trustee is liable for the loss of a trust fund caused by the fraudulent act of his solicitor, although in employing such solicitor he may have exercised ordinary care and discretion. *Bostock v. Floyer*, Eq. 26. In this case the trustee had handed the sum of £400, trust money, to his solicitor, a person of good character and extensive practice, who professed to invest the sum on a mortgage, and deposited with the trustee a bundle of deeds and documents relating to the title. He, moreover, paid the interest regularly up to the time of his death, ten years afterwards, when it was discovered that he had applied the money to his own use. The Master of the Rolls, Sir J. Romilly, said:—"The case is too clear for argument; the liability of the trustee is a matter of every day occurrence in the Court." This is simply the case of a person employing his servant to do an act, and the servant deceiving him; and any loss so occasioned must fall on the employer, and not on the *cestui que trust*. Of the two innocent persons, therefore, one of whom must suffer by the wrongful acts of the solicitor, the loss must fall on the trustee who employed him, and did not take all the precautions he might have taken against being deceived. The fund must be replaced with interest at 4 per cent."

Injunction—Board of Health.—An injunction was granted on the 6th of March, restraining a local board of health from causing or permitting sewage, or water polluted therewith, to pass through drains or channels under their control into a river, to the injury of the plaintiff, a miller, residing about three miles below the outfall of the works of the local board. Execution of the order was stayed till the 1st of July. The Company did not, subsequently to the 1st of July, stop the flow of sewage into the river, but alleged that they had not yet succeeded in discovering a mode of deodorizing the sewage—that compliance with the order was practically impossible, without stopping the drainage of the town, which would expose them to hostile proceedings at law and equity, and compel them to infringe an Act of Parliament; that there had been no wilful default, and that a sequestration would be ineffectual, as the property of the board was all public property—injurious to the public,

as preventing the board from discharging their duties—and futile, as it would compel the members of the board to resign:—*Held*, that there had been a gross and wilful contempt, and sequestration ordered to issue. *Spokes v. Banbury Board of Health*, Eq. 42. Vice-Chancellor Wood remarked in his judgment, “that the rights of those who are injured cannot depend upon the question of whether it be one or many who inflict the injury. First, take the case of an individual: see how it would stand, and whether there would not be a deliberate breach of the injunction. Suppose a man, for his own convenience, for the purpose of getting rid of his own sewage, something that annoys him, throws it into his neighbour’s yard, or into his neighbour’s river, and that he is ordered by the Court not to permit the sewage under his control to pass into his neighbour’s river, to his annoyance. Suppose that he afterwards comes here, telling the Court that he has consulted most eminent chemical authorities, and has done the best he can during a long continuance of inquiry, but that he has found out there is no possible mode by which he can deodorize the sewage, or at least that he has not yet arrived at or discovered it, and therefore that he has not ceased to pour that sewage into the river or upon his neighbour’s property; that he pours it into the river because he does not find it pleasant or agreeable to retain it; that he means to continue to pour it into the river until he shall find out something that will deodorize it; and then asks the Court to stay its proceedings until that is done. Would not that be a most outrageous breach of the order, and a flagrant contempt, for which the only proceeding the Court could take would be to order committal?”

JUDGE ADVOCATE HOLT.—*Harper’s Weekly* of Sept. 22d, rebuts the charge that Judge Advocate HOLT was in league with base men to injure JEFFERSON DAVIS by evidence which he knew to be false. It appears that SANFORD CONOVER (the same, we believe, who made himself notorious in Canada) offered to furnish Mr. HOLT with important evidence of the complicity of DAVIS and CLAY, and was accordingly engaged to collect the testimony. But the depositions thus obtained, when tested,

were contradicted by those by whom they purported to have been made, and CONOVER disappeared.

PUNCH’S LEGAL INTELLIGENCE.—We have received numerous inquiries about the Vacation Judge in Chambers. Our legal young man has undertaken to give our readers all the necessary information.

The Vacation Judge is the only Judge left in town during vacation. He is the “last rose of summer left blooming alone, all his pleasant companions are faded and gone.”

It is, generally speaking, a punishment (the only one which can be inflicted upon so high a legal functionary) for bad behaviour during term time, and is, evidently, the very opposite of college rustication.

His duties are light, but this is small compensation for the long imprisonment. He spends his time in starting imaginary objections, in taking notes of ideal cases, in making speeches to himself before the looking-glass, and in summing-up!

When tired of this, he plays leap-frog with the chairs, and dashes his wig.

After luncheon, he amuses himself by playing on a small comb through a piece of brown paper. Smoking is strictly prohibited in Chambers, but his Lordship is not unsuccessful in keeping on the windy side of the law, by putting his head out of the window in order to enjoy the fragrant Havannah. At seven o’clock his dinner is brought to him, and after that he is allowed one turn on a barrel-organ. At ten o’clock he sings a little thing of Sir ROUNDELL PALMER’S composition, and retires gracefully to his couch, which has been prepared for him at an earlier hour.

Anybody may look in and see the Vacation Judge, on payment of a small fee to the clerk in the outer office. The Vacation Judge is quite quiet, and will talk to a visitor through the bars of his window, or through the key-hole of his chamber door, with much playfulness and good temper.

Give him a joke to crack and he will evince his gratitude in his own peculiar fashion.

Such, for the instruction of your readers, is the amount of information which I can give you about the Vacation Judge.

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THE EXTRADITION OF LAMIRANDE.**[Second Notice.]**

On the 28th of August, when Mr. Justice DRUMMOND had finished reading the statement or judgment which appeared in our last issue, he adjourned the further consideration of the case to the 24th of September following. The *Saturday Review*, and other English journals, have expressed surprise at this long postponement. It does indeed seem rather singular that the learned Judge should have fixed so distant a day, especially as the full court of Queen's Bench was about to sit in appeal at Montreal, on the 1st of September. However, the inquiry, as we have stated, was adjourned to the 24th of September, when the September term of the Court of Queen's Bench, sitting on the Crown side, commenced, Mr. Justice DRUMMOND himself presiding. The Judge on that day formally exonerated Mr. Deputy Sheriff SANBORN from any blame in the matter, that gentleman having been in ignorance of the proceedings for *habeas corpus*, when he signed the order for the jailer to hand over the prisoner under the Governor's warrant. Mr. SCHILLER, the Deputy Clerk of the Crown, was also exculpated, on the ground that he had simply acted in obedience to instructions. The learned Judge, in his address to the Grand Jury, directed the attention of that body to the carrying away of LAMIRANDE, and strongly urged the necessity for an investigation.

Mr. Justice DRUMMOND then produced two copies of the *Montreal Gazette*, one of which contained the letter of Mr. RAMSAY, reprinted in our last issue, and the other contained another letter written by that gentleman, criticising the Judge's statement of the case, and censuring him for not issuing the writ at once, when application was made to him. These letters were printed in the *Gazette* over Mr. RAMSAY's signature. The learned Judge having ordered the papers to be filed, inquired of Mr. RAMSAY whether he was the author of

the letters. This question Mr. RAMSAY declined to answer, unless informed of the object. The Judge then directed that subpoenas should be issued, requiring the attendance of Messrs. LOWE and CHAMBERLIN, proprietors of the *Gazette*, on the following morning. His Honor declined to proceed with business till the matter of "discipline" was settled, and adjourned the Court.

On the morning of the 25th, Messrs LOWE and CHAMBERLIN failed to appear—not, we believe, through want of respect for the Court, but on account of what they conceived to be informality in the subpoenas ordering their attendance. No further proceedings, however, were adopted with respect to them, but the Judge stated that he must now treat the matter in a less lenient manner, and ordered a rule to issue against Mr. RAMSAY, returnable on Thursday, the 27th of September. Mr. RAMSAY expressed his readiness to reply at once, but the Judge would not alter the order. Further, his Honor waived the objection he had apparently entertained on the previous day, to Mr. RAMSAY's representing the ATTORNEY GENERAL, and the business of the term was proceeded with.

It would be idle to deny that the general impression of the bar on that morning was, that the Judge had receded from the position he had taken up, and that the matter was not to be carried further. Insinuations were even made that the influence of the Attorney-General had been brought to bear upon the Judge to induce him to give way, and an article appeared soon after in *Le Pays* on the subject, which gave so much offence to Mr. Justice DRUMMOND that he ordered a rule to issue against Mr. LUSIGNAN, the editor of that journal, to show cause why he should not be held in contempt of Court.

In the meantime, the argument on the rule against Mr. RAMSAY was adjourned from week to week, on the plea that public business must not be interrupted by taking up a matter of discipline; and Mr. LUSIGNAN having appeared and put in a written reply, the argument on the rule against him was fixed for the same day as the other, and also adjourned from time to time. At the date we write this, (Oct. 22) the argument has been fixed for Wednes-

day the 24th Oct. ; and we trust to be able to give some account of what transpires in our next issue.

We have now to revert to the action taken by the Grand Jury. In his charge, at the commencement of the term, Mr. Justice DRUMMOND instructed that body as follows:—

"In the investigation of any charge, either on an indictment, or for the purpose of a presentment, you can receive no evidence other than such as is *given by witnesses produced and sworn before you, or furnished by confession made upon voluntary examination before a magistrate, or by other legal documentary evidence. No affidavits or depositions should be received by you in evidence, except such as contain dying declarations in cases of alleged murder and manslaughter.* Even these should not be read as evidence before you, without previous consultation with the Counsel for the Crown, or in his absence, with the Clerk of the Crown, or by *permission of the Court.*

If, however, you deem it proper to make any such presentment, you should annex *notes of the evidence taken in support of it, signed by your foreman, and you should not announce in open Court the name of the person accused; while the Court, if, in its discretion it should order further proceedings, would be bound to prevent publicity being given to the proceedings of such a presentment, until an arrest had been effected.*"

Nevertheless, the gentlemen of the Grand Jury thought proper to prepare a series of interrogatories which they sent to the ATTORNEY GENERAL, the SOLICITOR GENERAL, and also to Mr. GODLEY, Civil Secretary, and Mr. GAUTHIER, Consul General of France. These interrogatories required the gentlemen above named to state all they knew about the LAMIRANDE case, and, as might be expected, they unanimously declined to reply. The only evidence in fact obtained by the Grand Jury was a deposition made by Mr. DOUTRE, Q.C., detailing the facts of the case; and reflecting rather severely upon the part taken in it by Mr. RAMSAY.

The Grand Jury having made their presentment, with copies of the correspondence and Mr. DOUTRE's deposition, Mr. Justice DRUMMOND (Oct. 13) adverted in Court to the extra-

ordinary course adopted by the Jury, in sending interrogatories to the officers of state and even to the GOVERNOR GENERAL, instead of applying to the Court to enforce the attendance before them of such witnesses as they might require.

The inquiry by the Grand Jury, therefore, proved wholly abortive—a result not surprising, when we reflect on the difficulties which must attend an investigation of this sort by men ignorant of the first principles of law.

We mentioned in our last impression that LAMIRANDE had been taken to Paris, notwithstanding the efforts of Mr. DOUTRE's correspondents in London to detain him. It appears, besides the embarrassment occasioned by the absence of the Judges from London during vacation, that the telegrams sent from this side by the GOVERNOR GENERAL and Mr. DOUTRE, were too meagre to admit of an affidavit being founded upon them, and LORD CARNARVON, the Secretary of State for the Colonies, with singular indifference, neither telegraphed for more information, nor authorized the detention of the prisoner till the mail should arrive. The case, however, has since been taken up by the English press, which, almost without a dissenting voice, has loudly denounced the carrying away of LAMIRANDE, and urged that he should be restored to the jurisdiction of our courts. Copies of all the documents connected with the case have been transmitted to the Home authorities, and the GOVERNOR GENERAL has no doubt been called upon for a full explanation. In the meantime, it is stated that the French authorities have been requested by the English Government to postpone the trial of LAMIRANDE.

THE GRAND JURY SYSTEM.

The attention of the English public has again been drawn to the consideration of the utility or inutility of grand juries. The juries themselves throughout the country have of late been complaining of the unnecessary demands made upon their time. At the Middlesex Sessions recently, the grand jury made a presentment to the effect that they did not think a grand jury was of the least use. They urged that the cases all underwent preliminary examination by professional men, and

therefore there was no need of the services of a grand jury. The Judge promised to forward their presentment to the proper quarter. So, too, at the last session of the Central Criminal Court of London, the grand jury expressed their firm conviction that the functions which they had been discharging were useless, and that the ends of justice would in no way be defeated, if bills of indictment ceased to be subjected to this preliminary examination.

When men are dragged together against their will, to do what they believe to be totally superfluous and unnecessary, it is not to be expected that their faculties will be even moderately roused into activity while engaged in such duties. It is therefore not to be wondered at, that the jury last referred to should have backed up their own confession of their inefficiency, by committing an error with singular consequences. A man was charged before them with committing an unnatural offence, and although there seems to have been little room to question his guilt, the grand jury rejected the bill. By a strange mistake, however, the words "a true bill," were endorsed on the indictment, instead of "no bill," and the prisoner was placed on his trial, convicted, and sentenced to ten years' penal servitude. Subsequently, the attention of the foreman being directed to the report of the trial in the newspapers, he attended in Court, and made an affidavit that the grand jury had rejected the bill. As, however, the bill and subsequent proceedings were all regular, the Judge could not interfere, and it only remained to communicate the facts to the Home Secretary. It is expected that a pardon will be granted to the convict in the general interest of justice.

Another singular instance occurred at Clerkenwell. A man and woman being jointly charged with robbing furnished lodgings, the grand jury found a true bill against the man, but ignored the bill as against the woman. With the natural indolence of men engaged in what they believe a useless task, they omitted to strike out the female prisoner's name. She was accordingly arraigned, pleaded *guilty*, and sentenced to a term of imprisonment. At the last moment, however, the

error was discovered, and the woman, to her great astonishment, set at liberty.

At the last term of the Court of Queen's Bench at Montreal, the grand jury found a true bill against a prisoner, on an indictment which lacked the necessary signature, without observing the defect. And, it may here be not out of place to notice, though we do it without expressing any opinion on the merits of the case, at the previous term a number of true bills were found against a gentleman, who has since published a pamphlet loudly denouncing the iniquity of secret indictments by grand juries, as affording facilities for concocting conspiracies, and gratifying private animosities.

These incidents have revived the discussion as to the expediency of the grand jury system, and the wakeful English public will probably not allow the matter to rest till the subject has been thoroughly weighed and examined. We see little to be urged in favour of the system. The gentlemen who act as grand jurors are utterly ignorant of the rules of evidence, and the first principles of criminal law. Or, if they have any ideas on the subject, it is probable that they are of such a nature as rather to mislead than to aid them. We have just seen the way in which a grand jury attempted to investigate the LAMIRANDE case; and as for the presentments with which these bodies usually wind up their functions, it is well known that they are invariably received by the public with the utmost indifference.

THE PRICE OF JUSTICE.

"Nulli vendemus, nulli negabimus aut differemus justitiam, vel rectum."—MAGNA CHARTA, CAP. xxix.

"To none shall we sell, to none deny or delay right or justice."

Upwards of six centuries and a half ago, this sentiment was expressed in written words as one of the settled axioms of the English Constitution, and thirty-nine times since have the Kings of England sworn to abide by the promise of their predecessor.

Then, it was necessary to oppose it to open bribery, tyranny and corruption. Since, the nations have been growing in learning, in wealth, and in civilization; until now the sense of freedom and of justice is so deeply

ingrafted in the breast of every citizen of the great civilized states of to-day, that any such gross neglect or fraud in the administration of justice, as was of common occurrence some hundred years ago, would at once be rectified by the common voice or power of the people. But there are more ways of selling justice than doling it out at so much per judgment. If the aid of the enforcing hand of the law be so entrenched with costs and disbursements as to be only accessible to the rich, is that not virtually a selling of justice to those who can afford to pay for it? Is not the poor man, by these means, as thoroughly debarred his rights as in the old days of iron, when might was right, and strong-handed castled injustice rode it rough-shod over the lands of our ancestors? And making the costs of obtaining a judgment, often proverbially an uncertain one, as heavy as they are at present in Lower Canada, is a lengthening out of the reign of injustice into days of liberal and enlightened thought—when justice should be had for the asking—unworthy of a free people.

There is scarcely a practising advocate in the country who has not met with numerous instances in which poor men have been deterred from prosecuting just claims, by the large disbursements which they would be obliged to make in order to obtain a judgment against their debtor—disbursements which they would willingly make, if they were able; but which come upon them in the hour of their sorest need, and when they most require all the aid and support of the law.

"Taxes on Justice," says Dr. Heron, in his Introduction to the History of Jurisprudence, "are unjust and indefensible upon the sound principles of juridical science." Mr. Hume considered the whole machinery of government to have as its sole aim the distribution of justice, while Lord Brougham has forcibly expressed the same idea, in saying that "the end of the whole paraphernalia of king, lords, commons, army and navy, is to place twelve honest men in a jury-box."

We pay taxes, to quote again from Dr. Heron, for the security afforded by government to our properties and liberties, and it is worse than absurd to discourage, by a tax, the

very means by which an injured subject seeks redress through the laws of the realm.

In the old times every sovereign kept up his revenue as best he could, and no means seemed easier or less obnoxious to the people than a tax upon suitors. To the rude reasoners of those days nothing appeared more equitable than that he who got a right enforced should pay for it, inasmuch as he reaped the principal advantage from it. From them was hidden the fallacy in this argument which is clear to us. By courts of law, supported by public authority, and backed by public might, the rights of all are protected, and every judgment, often obtained after long contestation and great costs,) is a new rivet serving to fix the rights and liberties of all. Therefore, the parties who suffer some injury to their rights ought not to defray the expense of the public justice by which they are redressed; for they are the persons who have been least benefitted by the protection of the law. As Bentham says, "the protection which the law affords them is not complete, since they have been obliged to resort to a court of justice to execute their rights and maintain them against infringement, whilst the remainder of the public have enjoyed the immunity from injury conferred by the law and its tribunals, without the inconveniences of an appeal to them."

A tax upon the administration of justice is a direct reward offered for injustice. Is it right? Is there not an inconsistency and want of sound ratiocination in this, that the same legislators should at the same time give rewards for informers, and impose taxes on justice, or, in other words, throw difficulties in the way of the legal redress for wrongs? Courts of justice should be paid for out of the general taxation, in the same way as the army and navy: for every man has as great an interest that justice should be upheld in the land as the parties actually in the case. In fact, were it possible, it would be meet that private as well as public wrongs should be settled entirely at the public expense. But this can never be; for there must always be some who make it their business to manage legal proceedings, and these, if paid by the state could not be expected to be as deeply

interested, or have the same zeal in individual cases as if personally interested in the result. Let, then, the public machinery of justice be paid for out of the public treasury; and let private suitors retain their own legal advisers. But this will encourage useless and annoying litigation, some will reply. Not at all. No doubt many more cases will be tried, but justice demands that there should, for many are now debarred from prosecuting just claims. If the sole end of administrative law be to do away with litigation, why then shut up the courts of justice at once; but if its aim be to establish right, what matter a few more cases in the courts, and a little more work for the legal functionaries, provided justice be done; and the loser in the cause having to pay the retainers on both sides, and a stringent law against the common barrator (annoying litigator) will always be a sufficient check against useless litigation.

In Lower Canada the administration of justice is sadly trammelled by law costs, and, as I have attempted to prove, there is a crying need of a reform. Let, then, some practical legislator, at the next session of parliament, take the matter in hand, and introduce a bill to do away with, or at all events lighten, the burden of the existing tariff of law costs; and, if he succeeds in carrying it, he will have the satisfaction of feeling that he has attained the proudest position that a statesman can reach, that of a real benefactor of his country; while let every one who opposes it remember that to him may be applied these powerful words of Jeremy Bentham:—"The statesman who contributes to put justice out of reach, the financier who comes into the house with a law-tax in his hand, is an accessory after the fact to every crime: every villain may hail him brother, every swindler may boast of him as an accomplice. To apply this to intentions would be calumny and extravagance; but as far as consequences only are concerned, clear of criminal consciousness, it is incontrovertible and naked truth."

WYVANT.

NOTICES OF NEW PUBLICATIONS.

THE AMERICAN LAW REVIEW.—The first number of this new legal Quarterly, published by

Messrs. Little, Brown & Co., of Boston, augurs well for the success of the undertaking. The editorial labour has been performed with great care and ability, and the contents are such as to render the *Review* a welcome visitant. The October number embraces articles on legal subjects, United States Cases, Digest of English Law Reports, Notices of New Publications, Summary of Events, Lists of the Judiciary, and other interesting and valuable information. We cordially commend the *Review* to the reader who wishes to be well informed of what is passing in the neighbouring republic.

SECRET INDICTMENTS BY GRAND JURIES.—We have barely had time to glance over this pamphlet, written by Mr. ASHLEY HIBBARD, of Montreal. It is mainly a narrative of the proceedings in cases in which Mr. HIBBARD was personally concerned, and which the writer uses to illustrate the evils of secret indictments by grand juries—a system which, he believes, affords facilities for carrying out conspiracies.

CHANGES IN THE LAW EFFECTED BY THE CODE.—We have before us two treatises on this subject; one by Mr. GIROUARD, published in the *Montreal Gazette*, and the other, a pamphlet published by Mr. McCORD, who for some time acted as English secretary to the Codification Commission. These treatises will be found useful in assisting the student to comprehend and master the changes which have been made in our law by the Civil Code now in force.

SUMMARY OF CURRENT EVENTS.

QUEEN v. BURROWS.—An interesting trial for manslaughter took place, at Montreal, on the 16th and 17th of October. The facts were these:—During the night of the 30th August, Mr. John G. Burrows, a gentleman residing with his sister in Montrose Terrace, Drummond Street, was twice called up by his sister, who was informed by the servant maid, that she had heard a noise as of some one scraping at her window in the basement, and had observed a man outside working at the wire screen. On the first occasion, Mr. Burrows took a lamp and searched the house, but saw no one. On the second alarm, Mr. Burrows armed himself with a revolver, and again de-

scended to the servant's room. Seeing a man in the act either of getting in or out of the window, and supposing him to be a burglar, Mr. B. fired, and by a singular fatality the intruder was mortally wounded, and died almost instantaneously. It turned out that the intruder was one Felix Prior, a coachman, and a man of good character, who could hardly be suspected of burglarious intention. Nevertheless, the wire screen was found to have been forced open, and although the body was found some paces from the window, lying in the close, yet the evidence of Dr. Reddy was to the effect that the deceased, if he were in the act, or had the intention, of retreating at the time the ball struck him, might have staggered forward that distance, from the impulse of previous volition. The wound, moreover, indicated that the ball had been fired by a person on a level with the deceased, a fact which favoured the hypothesis that Prior was actually on a table below the window, inside the apartment, at the time the shot was fired.

Mr. Burrows, of course, immediately gave himself up. An inquest was held, and a verdict obtained that Mr. Burrows killed the deceased in the defence of his life and property. This verdict seeming to leave an imputation on the memory of Prior, proved very distasteful to his friends and relatives, though, it must be observed, that the real motive of Prior in endeavouring to enter the room has never been cleared up.

At the last term of the Court of Queen's Bench, Mr. Burrows was indicted before the grand jury, and a true bill found for manslaughter. Messrs. Kerr and Houghton were his counsel at the trial, Mr. Devlin appearing for the private prosecution. No new facts were elicited at the trial, and the jury found a verdict of *excusable* homicide, not *justifiable*, thereby clearing the character of the deceased from the imputation of felonious intention.

THE MONTREAL BAR.—The first examinations of candidates, under the amended by-laws, for admission to practice and study, took place on the 16th of October. The examinations, after this year, are to be held quarterly, and will be conducted by a number of sub-committees.

ADMISSIONS TO STUDY.

The following are the names of the gentlemen who have been admitted to the study of the law, by the Montreal Board of Examiners, since the 1st day of May, 1866.

Henry C. St. Pierre.....	7th May.
Emile Fauteux.....	"
Gustave Piché.....	"
Arthur Lacoste.....	"
A. F. D'Eechambeault.....	"
Adolphe Daoust.....	"
R. M. Howard.....	"
Stanislas Côté.....	4th June.
A. Roi.....	"
M. B. Bethune.....	"
W. J. Watts.....	"
Hector Marchedon.....	"
J. N. Bienvenu.....	2nd July.
L. A. Brunet.....	"
A. B. Irvine.....	"
T. Vaillancourt.....	"
Joseph Dubuc.....	6th Aug.
John Keller.....	3rd Sept.
C. Arpin.....	"
L. Lafamme.....	"
A. Marsan.....	"
W. Fauteux.....	"
E. Cornwallis Monk.....	16th Oct.
Wentworth B. Monk.....	"

ADMISSIONS TO PRACTICE.

Name.	Date of Examination.	Date of commission.
Alphonse Lachapelle..	2nd April.	5th April.
Ulderio Bellemare....	7th May.	8th May.
Jean Robidoux.....	7th May.	15th May.
C. A. Geoffrion.....	4th June.	4th June.
Anthime Pilon.....	4th June.	4th June.
C. B. Carter.....	6th Aug.	5th Sept.
Thomas P. Butler....	"	27th Sept.
Pierre U. Duprat....	3rd Sept.	"
Thomas A. Corriveau..	"	7th Sept.
Joseph U. Pouliot....	"	10th Sept.
R. A. A. Jones.....	"	5th Sept.
Gustave A. Drolet....	"	16th Oct.
Joseph T. St. Julien..	"	4th Sept.
Alphonse Jacques....	16th Oct.	17th Oct.
Wm. O. Farmer.....	"	17th Oct.
Louis Tellier.....	"	16th Oct.
John P. Noyes.....	"	"

H. L. SNOWDON, *Secretary.*

COMPLIMENTARY DINNER BY THE MONTREAL BAR.—On the 25th of September, a complimentary dinner was given by the members of the bar for the district of Montreal to the General Council of the bar for Lower Canada. Mr. DAY, Q. C., presided. Only two members of the General Council were present, and many other distinguished members of the bar, who were expected to be present, were prevented from attending by various causes. The entertainment, therefore, can hardly be said to have met with the success anticipated.

REGINA v. DAoust.—In the Court of Queen's Bench, Oct. 19, Mr. Justice Mondelet presiding, Mr. Ramsay moved for sentence on Daoust, convicted of forgery. The learned judge said that although the judges sitting on the Appeal side had refused to permit a new trial, (ante p. 29), yet that that part of his (Mr. Justice Mondelet's) judgment which set aside the previous verdict had been left untouched, and therefore there was no verdict. The motion, accordingly, was rejected.

CHIEF BARON POLLOCK.

[The following sketch (from the *Pall Mall Gazette*) of Chief Baron Pollock, who has retired during the present year, will be read with interest. The Chief Baron is the son of David Pollock, a saddler at Charing Cross; and brother of the late Sir David Pollock, an Indian Judge, and of General Sir George Pollock. He was born in 1783; educated at Trinity College, Cambridge, where he was Senior Wrangler; and was called to the bar of the Middle Temple, in 1805. He joined the Northern Circuit; became a King's Counsel in 1827, Attorney-General in 1834 and 1841; and succeeded Lord Abinger as Chief Baron in 1844.]

The judges are probably the best known of all our public men. A great politician addresses the House of Commons a certain number of times in the course of a session; but to the public at large he is but a name, representing particular political opinions. Even when he addresses a public meeting, or makes an after-dinner speech, he is more or less of an actor. A judge, on the other hand, transacts all his business in public. He is one of the shows,

not only of London, but of every country town; and is constantly brought into direct personal relations, not only with every member of a large and most active profession, but with men in all ranks of life and on every sort of subject. He is, moreover, perfectly independent of those with whom he has to deal. His position is as secure as law and public feeling can make it. If he is ill-tempered, lazy, tyrannical, or even merely disobliging, he can indulge his failings without any special risk. No man can with perfect impunity give so much offence, or do so many and such deadly injuries, as an ill-disposed judge; nor is any man so continually on his trial. It is pleasant to reflect that, under these circumstances, the fifteen judges are, with hardly an exception, exceedingly popular, not only with the profession to which they belong, but with the public at large; and we shall doubt whether any one ever took with him into retirement a larger share of hearty, affectionate admiration than the kind old man, who, after presiding over the Court of Exchequer for nearly a quarter of a century, retires into private life, full of freshness and vigor, and surrounded as closely as ever man was by all that should accompany old age. No doubt the Chief Baron had his failings. He had been so consummate an advocate at the bar that he never quite threw off his old habits. He belonged to that class of judges who distinctly take a side in the course of a case, and makes no mystery to the jury of the opinion which they have formed. It may admit of a good deal of argument, whether this habit does or does not favour substantial justice. To hit the exact line between fairly directing and unduly pleading from the bench is very difficult. Certainly the attempt to be scrupulously neutral often ends in puzzling the jury, and in suggesting doubts to them on points which are in reality quite plain. Whether the Chief Baron always hit the golden mean, no one could possibly doubt of the goodness of the motives by which he was actuated. He may sometimes have been a little too much of an advocate, but he was always an advocate for what appeared to him the cause of justice, truth, and good morals; and of these he was no bad judge. There were two characteristics about his behaviour on the bench, which

no one could mistake,—his extraordinary gifts, and the extreme kindliness and even tenderness of his nature. When fairly roused in a case which put him on his mettle, he would speak with a vivacity, a choice of language, and a dignity and power of manner, which recalled the old leader of the Northern Circuit in its best days, to those who had known him before he was a judge. His lighter gifts were singularly winning. He was full of humor. The solemn orations which he used to make on Lord Mayor's day—a distinct and separate oration for each new Lord Mayor—were as good as a play, and will long form a pleasant tradition in Westminster Hall. His knack of committing innocent forgeries was another specimen of the general adroitness and dexterity of mind and body which distinguished all that he did. He once directed a letter to a barrister in a hand so exactly like that of the barrister himself (and a wretchedly bad hand it was), that his correspondent supposed that he must have left at his chambers an envelope addressed to himself. His talents, however, were not the most characteristic point about him. We should doubt, whether, after all his long career, he had an enemy in the world, or even a casual acquaintance who did not feel towards him as a friend. Every tone of his voice, every expression that he used, when the occasion required it, was full of good nature and warmth of heart, though without a trace of weakness. He belonged to a race and generation which is hardly being renewed, but the felicity of his career will always be exceptional. A man who is distinguished from one end of life to the other—who, from being Senior Wrangler, develops rapidly into being the leader of the Northern Circuit, Attorney-General, and Chief Baron—is, as the phrase goes, “commoner in fiction than in real life.” Those who had the opportunity of seeing from day to day how very pleasant such a reality might be, learnt something from it which they are not likely to forget.

LEGAL APPOINTMENTS IN IRELAND.—The Right Hon. Francis Blackburne was, on the 23rd of July, sworn in as Lord Chancellor, and Mr. White-side as Lord Chief Justice of Ireland¹.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

QUEBEC, * Sept. 19.

FREER et al., (defendants in the Court below) Appellants; and *MAQUIRE et al.*, (plaintiffs in the Court below) Respondents.

Shipbuilder—Liability of Mortgagee of Vessel.

The defendants advanced money to G., to enable him to complete a vessel, and as security for their advances, the vessel was mortgaged to them, and it was “expressly covenanted and agreed by and between the said parties, that the said vessel shall be and is the absolute property of the said defendants, so that they shall take and obtain the register of the said vessel in their own name, and may sell and dispose of the same, and give a good and valid title thereto”:—

Held, that the defendants were not liable for goods sold by the plaintiffs to G., before the vessel was registered, for the purpose of furnishing it.

This was an appeal from a judgment of the Circuit Court, Montreal, on the 31st of May, 1865, condemning the appellants, Messrs. Freer, Boyd & Co., to pay the sum of \$165.05 for goods sold and delivered to them by the respondents during the year 1864. The action was an ordinary action for goods sold and delivered, with the usual *assumpsit* counts, and the plea was a general denegation. The facts were simple:—In the autumn of 1863, one James Goudie, a shipbuilder, commenced building the barque *Annie McKenzie*, on his own account, and in January, 1864, made arrangements with the appellants for advances to the extent of \$14,000, to aid him in completing the vessel. These advances were made under a notarial contract, and, as security for them, Goudie mortgaged the vessel to the appellants, with a power of sale in case of non-payment. The agreement contained the following clause:—“It is expressly covenanted and agreed by and between the said parties,

* In the ten cases reported below, the argument took place at Montreal, but judgment was rendered at Quebec. We have, therefore, no note of the Judges' remarks, and have been obliged to rely upon the recorded judgment.

that the said vessel shall be and is the absolute property of the said Freer, Boyd & Co. (the defendants), so that they shall take and obtain the register of the said vessel in their own name, and may sell and dispose of the same, and give a good and valid title thereto." Instead of \$14,000, the appellants actually advanced \$24,000, from time to time, and then refused to go any further, and insisted upon the delivery over of the vessel. Goudie then refused to sign the builder's certificate, necessary to enable the appellants to register the vessel, unless they would pay various demands against him by parties who had supplied materials and stores used in furnishing. Finally, he signed the certificate upon the appellants paying two of the claimants 10s. in the £. Thereupon the respondents, Maguire & Co., who were among the claimants that the appellants refused to pay, instituted the present action, seeking to hold the appellants liable. The only witnesses examined were Goudie and his son, and McIntosh, one of the furnishers to whom the appellants had paid 10s. in the £. The only question was whether the appellants had in any way rendered themselves liable for the goods. The Court below having held them liable, the present appeal was brought.

The reasons urged in support of the appeal were as follows:—That there was not a word of evidence to show that the respondents ever had anything whatever to do with the appellants, whether by purchase of goods or otherwise. The goods were proved by the respondents' witnesses, to have been bought by Goudie's son for his father; and, by the same witnesses, to have been delivered to the elder Goudie, and used by him in the construction of a vessel he was building for his own benefit. They never ordered the goods or authorized their being ordered; they never used them, and never undertook any responsibility in respect of them. *Bridgman and Ostell*, 9 L. C. R. 445, was referred to, in which case it was held in appeal (reversing the judgment of the lower Court) that a person contracting for a house to be built for him, is not responsible for materials furnished by third parties to the contractor for finishing the house, where such materials were sold to the contractor, and not to the proprietor.

Per Curiam. (DUVAL, C. J., MEREDITH, DRUMMOND, and MONDELET, JJ.) Considering that by the evidence adduced in this cause, it appears that the goods mentioned in the plaintiffs' declaration were sold by the plaintiffs to James Goudie and not to the defendants; therefore, that in the judgment of the Court below, condemning the defendants to pay for the said goods, there is error, &c., the Court doth reverse the judgment, and dismiss the action of the plaintiffs, with costs of both Courts.

Judgment reversed.

Abbott, Q. C., for the Appellants.

Curran, for the Respondents.

NORDHEIMER et al., (plaintiffs in the Court below) Appellants; and *MARIE R. R. DUPLESSIS, et vir*, (defendants in the Court below) Respondents.

Revendication—Sale by Bailiff out of District—Practice—Purchase from Lessee.

The plaintiffs revendicated a pianoforte which had been purchased by the defendants at a judicial sale of the goods of a party to whom the plaintiffs had leased the instrument. This sale was made by the bailiff in a different district from that in which the instrument was seized:—

Held, that the sale was null and void, and could not convey any right of property as against the proprietors.

Held, also, that the Court had power to declare the sale null, without any conclusions to that effect in the plaintiffs' declaration or special answers.

This was an appeal from a judgment of the Superior Court, at Montreal, rendered by *Monk, J.*, on the 30th of June, 1865, dismissing the appellants' action with costs. The action was brought to revendicate from the respondent, Duplessis, a piano which the appellants had leased to one Cordelia Martin, wife of Thomas Dagenais.

The plea of the defendant was that she had purchased the instrument at a sale made at Montreal, by one Beaulac, a bailiff from the district of Richelieu, in execution of a judgment of the Circuit Court for that district against Thomas Dagenais. The plaintiffs answered, that the piano had only been leased to Cordelia Martin, the wife of Dagenais, from whom she was separated as to property; that the sale

by the bailiff was illegal and void; and that the defendant, being the mother of Mrs. Dagenais, was aware of the lease, and of the fact that the piano was the plaintiffs' property.

It appeared from the evidence that the piano was first seized in Dagenais' possession at St. Ours, under a judgment of the Circuit Court for the district of Richelieu. Madame Dagenais put in an opposition, which was dismissed. Then Dagenais having left St. Ours, and settled at Montreal, took the piano with him. Then the bailiff went beyond the district of Richelieu, and seized and sold the piano in Montreal, the defendant, Madame Dagenais' mother, becoming the purchaser. The Court below dismissed the action, on the ground that though the sale of the piano by the bailiff was illegal, yet it was impossible for the Court to declare the sale null and void, without any conclusion to that effect either in the plaintiffs' declaration, or in their special answers.

From this judgment the plaintiffs appealed, submitting that it was not necessary to bring an action to set aside the bailiff's sale, or to take any conclusions to that effect. The only question was, who was the proprietor of the piano at the time of the institution of the action. If the defendant's title was bad, the plaintiffs' action should have been maintained.

Per Curiam. (DUVAL, C. J., MEREDITH, DRUMMOND, and MONDELET, JJ.) Considering that by the evidence adduced, it is established that the pianoforte claimed by this action, is the property of the appellants, who had the legal possession thereof, and that the sale and adjudication alleged to have been made to the respondent are illegal, null and void, and could convey no right of property in the same to the respondent; considering, therefore, that the action of the plaintiffs revindicating the piano was well founded and should have been maintained, and that in the judgment of the Superior Court dismissing the plaintiffs' action there is error, this Court doth annul, reverse and set aside the judgment, and doth maintain the plaintiffs' action, declaring them to be the true and lawful owners of the said pianoforte, and condemn the defendant to deliver the same to the plaintiffs within eight days from

the service of the present judgment, and in default of her so doing within the delay, condemn her to pay \$250.

Judgment reversed.

Dorman, for the Appellants.

Leblanc, Cassidy & Leblanc, for the Respondents.

GRANT, (defendant in the Court below) Appellant; and LOCHEAD, (plaintiff in the Court below) Respondent.

Landlord and Tenant—Damages—Mode of rendering Judgments.

The plaintiff leased from the defendant a farm for a term of years, with a stipulation that the landlord might cancel the lease on giving six months' notice, but in such case he was to take, at a valuation, the manure on the land, in excess of the usual quantity left by outgoing tenants. The landlord having sold the land cancelled the lease, but the tenant continued in possession, under the new proprietor, at an increased rent:—

Held, that the tenant was entitled to recover for the excess of manure on the land at the time the lease was cancelled.

Quere as to mode of rendering judgments.

This was an appeal from a judgment rendered by *Badgley, J.*, in the Superior Court at Montreal, on the 31st of May, 1865.

The action was brought by the respondent to recover from his landlord £250 damages, *ex contractu*, for having cancelled his lease. On the 5th of July, 1861, the defendant leased to the plaintiff a farm at Hochelaga, for the term of seven years, at £75 per annum. The lease stipulated amongst other things that, in the event of the termination of the lease by sale or otherwise as therein provided, the manure drawn upon the farm by the lessee, beyond the quantity usually left upon a farm by outgoing tenants, should be taken at a valuation. It was also provided that either party might rescind the lease on giving the other six months' notice. On the 20th June, 1862, the defendant notified the plaintiff of the termination of the lease to take place on the 1st of May, 1863, as the land was to be sold to the Hon. S. Gale. The plaintiff alleged that in 1861 and 1862, previous to the notice, he had placed a large quantity of manure upon the farm. For the value of this he offered t

accept an arbitration, but the defendant having refused an arbitration, the plaintiff instituted the present action, claiming the value of the manure and of certain fall ploughing. The claim for fall ploughing was dismissed, but the Court found from the evidence that at the termination of the lease, the plaintiff had put upon the farm (over and above the quantity agreed to be left) 325 loads of manure, which at the valuation established by the evidence of record, amounted to \$315, and the defendant was condemned to pay this sum.

An appeal was taken, and the points submitted by the defendant were, 1st, on the merits, that the plaintiff could not recover, because the manure placed on the farm had been worked into the soil, and the plaintiff had had the benefit of it in the green crop of 1862. Further, that the plaintiff had remained in possession of the farm as the tenant of the purchaser, Judge Gale, after he brought his action. It was true he remained at the advanced rate of £90, but he got an additional extent of land. The principal point, however, that was urged by the appellant was irregularity in the mode of rendering the judgment in the Court below. It appeared that judgment was first rendered in open Court on the 31st of March, 1865, dismissing the plaintiff's action. The plaintiff inscribed the case for review, but in the meantime the judge, having discovered an oversight, recalled the judgment, and on the 25th of April, again rendered judgment verbally for \$315 in plaintiff's favour. Subsequently, a re-hearing was ordered, the defendant did not appear at this, and finally the judgment appealed from was rendered on the 31st of May. The defendant submitted that the rendering of a judgment in open Court constituted a final judgment, and could not be subsequently altered by the judge.

Per Curiam. (DUVAL, C. J., MEREDITH, DRUMMOND, and MONDELET, JJ.) There is no error in the judgment appealed from, and consequently it must be confirmed.

Kerr, for the Appellant.

Mackay & Austin, for the Respondent.

HUNTER, (plaintiff in the Court below) Appellant; and GRANT, (defendant in the Court below) Respondent.

Payment—Collateral Security.

An action for goods sold and delivered. Question of evidence as to whether a transfer of instalments coming due under a deed of sale was given in full payment of the debt, or merely as collateral security.

This was an appeal from a judgment of the Superior Court, rendered at Montreal by *Monk, J.*, on the 30th of June, 1865, dismissing the plaintiff's action.

In September, 1864, the plaintiff sold goods to the defendant to the amount of \$623.12, and in February following brought an action for \$600, balance alleged to be due on this sale. The plea of the defendant was, that he had paid for the goods by making a transfer to the plaintiff, on the 12th of September, 1864, of \$600, being the last five instalments payable to the defendant, under a deed of sale by one Regis Petel; and that he had paid the balance, \$23.12, in cash. The plaintiff answered that the transfer was received only as collateral security, and did not discharge the defendant.

The Court below dismissed the action on the ground that the transfer contained a clause of warranty, *de fournir et faire valoir*, and that the delays and terms of credit mentioned in the transfer, for the payment of the amount therein specified, were available by the defendant, and operated in his favour, under the terms and considerations of the transfer.

Per Curiam. (DUVAL, C. J., MEREDITH, DRUMMOND, and MONDELET, JJ.) Considering that the appellant hath fully proved the sale and delivery to the respondent of the goods and merchandize, for the value of which the action was brought; considering that the allegations of the plea have not been proved, and that the transfer referred to in the plea was not given in full payment of the appellant's debt, but merely as collateral security for the payment thereof; considering, therefore, that in the judgment there is error, &c. Judgment reversed, and respondent condemned to pay \$600.

Dorion & Dorion, for the Appellant.

Leblanc, Cassidy & Leblanc, for the Respondent.

HOGLE, (plaintiff in the Court below) Appellant; and McCORKILL, (defendant in the Court below) Respondent.

Petitory Action—Prescription of Ten Years.

Petitory action by vendee of person to whom land was patented. The defendant having proved more than ten years' open, uninterrupted and peaceable possession, under title, by himself and predecessor:—

Held, that he had acquired prescription, and the plaintiff's action could not be maintained.

This was an appeal from a judgment of the Superior Court, rendered by McCord, J., on the 19th of October, 1864.

The action was a petitory action, brought for the recovery of Lot. 36, in the first range of Farnham, district of Bedford, which the plaintiff alleged was patented on the 25th of October, 1832, to one Samuel Tubby, who sold to the plaintiff on the 6th of October, 1859. He further alleged that the defendant, on or about the 8th of October, 1859, did unlawfully enter upon and take possession of, &c.

The defendant pleaded, 1st, that by himself and *auteurs*, he had possessed for more than forty years; that about the year 1820, Matthew Sax took possession, and held until the 8th of July, 1841, when he sold to Joseph Russell, who continued in possession till the 13th of December, 1853, when he sold to the defendant, who possessed up to the institution of the action in 1860. The defendant further alleged that the grant of letters patent, in favour of Tubby, had been given on the express condition, that if he should not within a year plant and cultivate at least two acres for every 100 acres, and at least seven acres for every 100 acres in seven years, the grant was to be absolutely null and void, and that as this condition had never been complied with, and the patent in the origin was obtained by fraud and deception, the grant was null and void. 2nd, That defendant, by himself and his *auteurs*, had been in uninterrupted and peaceable possession *animo domini* for a period exceeding thirty years. 3rd, Possession under a title for more than ten years, *dix ans entre presens*. 4th, That defendant had made improvements to the value of \$13,000, and could not be compelled to give up the land, unless he were repaid this sum.

The action was dismissed in the Court be-

low, on the ground that the plaintiff had "failed to establish in evidence the material allegations of his declaration." From this judgment the plaintiff appealed, submitting, 1st, That the thirty years' prescription was not proved. 2nd, That the attempt on the part of the defendant to urge, in his own behalf, the rights of the Crown under the letters patent, was manifestly unfounded. The defendant could not insist upon the pretended escheat to the Crown. 3rd, That the ten years' prescription was not made out.

The respondent submitted that neither the appellant nor his *auteur*, Tubby, ever had or pretended to have any kind of possession whatever; he rested his action upon the naked allegation of title; whereas the respondent had held possession for nearly seven years under his own title, and his *auteur*, Russell, more than twelve years under title from Sax. He referred to the case of *Stuart v. Ives*, 1 L. C. R. 193, and *Stodart v. Lefebvre*, 8 L. C. J. 31.

Per Curiam. (DUVAL, C. J., MEREDITH, DRUMMOND, and MONDELET, JJ.) Considering that the respondent had for ten years and upwards before the institution of the present action, under a good title and in good faith, as well by himself as by his predecessors openly and peaceably, and without interruption or disturbance, between persons of full age and not privileged, possessed and enjoyed the lot of land and premises in question in this cause; considering, therefore, that the said respondent had, before the institution of this action, acquired prescription, and a title by prescription, in the said lot of land and premises, and was at the time of the institution of the said action, the sole lawful owner and proprietor thereof, this Court doth confirm the judgment of the Court below, with costs in both Courts, &c.

A. & W. Robertson, for the Appellant.
Cross & Lunn, for the Respondent.

Sept. 20.

BURROUGHS, (opposant in the Court below) Appellant; and PATRICK KIERNAN, (defendant contesting opposition in the Court below) Respondent.

Sale of property under seizure.

The appellant purchased from F., by a deed

sous seing privé, a piece of land under seizure at the suit of P. This deed was not enregistered, and, moreover, the property had been donated to F. by P., with the condition that F. should not alienate it during P.'s lifetime. The appellant having put in an opposition, based on his purchase, to the sale of the property:—

Held, that his opposition was unfounded.

This was an appeal from a judgment rendered at Montreal by *Monk, J.*, on the 31st of December, 1864, dismissing an opposition filed by the appellant. The following were the facts of the case:—The respondent, Patrick Kiernan, who was defendant and incidental plaintiff in the Court below, having obtained a judgment against Francis Kiernan, seized an immoveable belonging to the latter. Francis Kiernan put in an opposition to the sale, and his opposition was maintained, by a judgment rendered 12th August, 1864. Patrick Kiernan appealed from this judgment, but while the appeal was pending, Francis, with a view of terminating the difficulties with Patrick, desisted from the judgment on the opposition, and consented to allow Patrick, the respondent, to proceed with the seizure. The respondent accordingly filed the *acte de désistement* with the Prothonotary, and issued a writ of *vend. ex.* for the sale of the immoveable previously seized. To this proceeding, the appellant, Charles S. Burroughs, put in an opposition, alleging that he had been the attorney of Francis Kiernan on the opposition which had been maintained, and that Francis Kiernan, on the 9th of May, 1864, had sold the property seized to him, Burroughs, to pay his costs. Patrick Kiernan, the respondent, answered, that this pretended sale had not been followed by tradition, and could not have any effect, as the property was under seizure. Subsequently, the respondent amended his contestation, by alleging that the deed of sale *sous seing privé*, invoked by the appellant, had not been enregistered; and that by a deed of donation in 1843, the respondent had given Francis Kiernan this same piece of land, on condition that he should not alienate it during the respondent's lifetime.

The opposition being dismissed, the appellant appealed.

Per Curiam. (DUVAL, C. J., AYLWIN, MEREDITH, and MONDELET, JJ.) There being no

error in the judgment appealed from, it is confirmed with costs.

J. & W. A. Bates, for the Appellant.

Dorion & Dorion, for the Respondent.

LATOUR *et al.*, (defendants in the Court below) Appellants; and GAUTHIER *et al.*, (plaintiffs in the Court below) Respondents.

Promissory Note—Aval.

A note, payable to the order of the plaintiff, was endorsed first by L. L. and P. G. L., and underneath these names by the plaintiffs:—

Held, that L. L. and P. G. L. endorsed as *avals* and security for the maker.

This was an appeal from a judgment of the Superior Court, rendered at Montreal by *Berthelot, J.*, on the 30th of April, 1864.

The action was instituted by the respondent, against Joseph Lacroix, the maker, and L. A. H. Latour and P. G. Lemoine, the endorsers of a promissory note for \$300, payable three months after date, to the order of Gauthier & Desmarteau, at the Banque du Peuple. The note was endorsed by Latour and Lemoine, and then underneath by Gauthier & Desmarteau. The plaintiff sued Latour and Lemoine as *avals*. The maker of the note did not appear, but Latour and Lemoine, the present appellants, appeared and pleaded—1st, That they had not put their names on the note as *avals*, but as last endorsers. 2nd, That the maker of the note had only received a value of \$150.

The evidence showed that Lacroix, the maker of the note, wishing to buy a quantity of flour from the respondents, offered them the names of the appellants as sureties, and that the latter endorsed the note as such. This was confirmed by the form of the note, and the position of the names on the back of it. The Court below having maintained the plaintiffs' pretensions, and held the appellants liable as *avals* and *cautions solidaires*, the present appeal was instituted.

Per Curiam. (DUVAL, C. J., AYLWIN, MEREDITH, and MONDELET, JJ.) There being no error in the judgment of the Court below, it is confirmed with costs.

Barnard, for the Appellants.

Bondy & Fauteux, for the Respondents.

Sept. 19.

ROLLAND, (defendant in the Court below)
Appellant; and St. DENIS *et al.*, (plaintiffs in the Court below) Respondents.

Partnership—Separate Debt.

The defendant bought wood from one of the partners in a firm, in ignorance of the existence of the partnership. This partner owed him money, but the wood was the property of the partnership:—

Held, that the defendant could not set off the amount of his purchase against the debt due him by the partner from whom he bought, although the latter managed the affairs of the partnership:—

This was an appeal from a judgment of the Superior Court, rendered at Montreal by *Badgley, J.*, on the 30th of June, 1865, in favour of the plaintiffs.

The action was brought by J. Bte. St. Denis and Adolphe Roy, to recover the sum of \$534.55, for wood sold and delivered to the defendants by the plaintiffs, whilst the latter were partners. The plea of the defendant was that he had bought the wood from J. Bte. St. Denis, one of the plaintiffs, who had sold in his own name, and in set off to a sum of \$960 which St. Denis owed him. That at the time the defendant purchased this wood, St. Denis was carrying on business in his own name at Montreal and elsewhere, and no partnership was registered. The defendant further alleged that at the time he bought the wood, it was expressly agreed between him and St. Denis that the price was to be set off against St. Denis' debt.

By the judgment of the Court below, it was held that the wood was the property of the copartnership of the plaintiffs, under the firm of J. Bte. St. Denis & Co., established under articles of copartnership dated 18th Dec., 1860; that the defendant, as a separate creditor of St. Denis, one of the partners, could not legally set off the amount of his purchases from the copartnership against the separate debt due by St. Denis, who, moreover, without the consent of his copartner, could not pay the defendant his separate debt out of the goods of the copartnership.

From this judgment the defendant appealed, submitting that St. Denis, being the adminis-

trator and manager of the affairs of the copartnership, had the right to contract as he did in his own name; and, further, that the defendant had no opportunity of becoming acquainted with the existence of the partnership, and that the moneys he had advanced to St. Denis were employed about the partnership business.

Per Curiam. (DUVAL, C. J., MEREDITH, DRUMMOND, and MONDELET, JJ.) There being no error in the judgment, it is confirmed with costs.

F. X. Archambault, for the Appellant.

Leblanc, Cassidy & Leblanc, for the Respondents.

LEGER, (plaintiff in the Court below) Appellant; and TATE *et al.*, (defendants in the Court below) Respondents.

Sale of Raft.

Question of evidence as to terms of sale and value of a raft.

This was an appeal from a judgment rendered by *Monk, J.*, on the 30th November, 1865, in the Superior Court, Montreal. The action was brought for the sum of \$822.47, balance alleged to be due on account of a raft of timber, sold and delivered by the plaintiff to the defendants, containing 22,373 feet, at the rate of fourpence per foot. The declaration alleged the contract of sale on the above terms, and also contained the *quantum meruit* count. The plea was to the effect that the plaintiff sold the raft, with the stipulation that he was to get one halfpenny per foot more than he had paid for it to one Brodie, viz. two-pence three farthings per foot, and that the balance due was only \$58.58, which the defendants brought into Court with their plea.

The plaintiff failed to prove the alleged contract of sale at fourpence, and did not establish any higher value than that admitted by defendants in their plea which was maintained by the Court below. The plaintiff appealed.

Per Curiam. (DUVAL, C. J., MEREDITH, and DRUMMOND, JJ.) The judgment was right and is confirmed with costs.

MONDELET, J., dissented.

Denis & Lefebvre, for the Appellant.

Mackay & Austin, for the Respondents.

MORIN, (plaintiff in the Court below) Appellant; and PALSgrave, (defendant in the Court below) Respondent.

Possessory Action—Uninterrupted Possession.

Held, that in order to maintain an action *en complainte*, the plaintiff must have had exclusive and uninterrupted possession of the property during the year and day previous to the institution of the action.

This was an appeal from a judgment of the Court of Review,* at Montreal, on the 31st of October, 1865, by *Badgley, Berthelot, and Monk, JJ.*, reversing a judgment rendered by *Loranger, J.*, in the Superior Court for the district of Richelieu, on the 19th of April, 1865.

The plaintiff brought a possessory action, setting out that for more than a year and a day, namely, for more than thirty years before the beginning of the current year, he had possessed peaceably and without interruption a certain property in St. Ours. That within a year and a day he had been troubled in his possession by the defendant, who had entered on the land and carried off wood. The plaintiff accordingly prayed that he be maintained in his possession, and that the defendant be ordered to desist from his encroachments, and be condemned to pay £60 damages.

The defendant, among other grounds of defence, pleaded that he had been in possession of the land, and was the lawful proprietor.

Loranger, J., maintained the plaintiff's action, holding that the defendant had committed *saisine et nouvelleté*, and that he had failed to prove the contrary possession invoked by him. The defendant having inscribed this judgment for review, it was reversed, as above stated, *Badgley, J.*, who rendered the judgment of the Court, stating that it was clear from the evidence that both parties had been in possession of the property previous to the institution of the action, and, therefore, the plaintiff's possessory action could not be maintained. His recourse, by petitory action, was reserved. From this judgment the plaintiff instituted the present appeal.

Per Curiam. (DUVAL, C. J., MEREDITH,

and DRUMMOND, JJ.) The judgment of the Court of Review was correct, and is confirmed. MONDELET, J., dissented.

Germain, for the Appellant.

Lafrenaye & Bruneau, for the Respondent.

*QUEBEC, September Term, 1866.

Coram DUVAL, C. J., ATYWIN, MEREDITH, DRUMMOND, and MONDELET, JJ.

GUILLEMETTE, (defendant in the Court below) Appellant; and LAROCHELLE, (plaintiff in the Court below) Respondent.

Action en complainte—Trouble.

Held, that the possession of a year and a day, upon which may be founded an action *en complainte*, must immediately precede the trouble complained of, and must also be continuous and decided.

That carrying away wood already cut is not a *trouble de fait* sufficient to found an action *en complainte*.

This was an appeal from a judgment of the Court of Revision, confirming a judgment of the Superior Court rendered in the district of Beauce.

The action was a possessory one, and the facts of the case were as follows:—The appellant held a certain lot of land in the parish of Ste. Marguerite (Beauce) since 1856, *a titre de censitaire*, upon which he was in the habit of working from time to time, though not very frequently, as he lived in another parish. In the autumn of 1862, the respondent, during the absence of the appellant, took possession of the lot in question and commenced to work upon it. Shortly afterwards, by a verbal agreement, the appellant promised the respondent to sell him the lot in question, for the sum of \$40, and 400 stakes, and allowed him to continue in possession. In the month of October following, Larochelle visited the seignior of the land, (the Hon. J. T. Taschereau), and by false representations that Guillemette had abandoned the lot, obtained from him a promise of a concession of the same, and a receipt for part of the arrears of *cens et rentes* due upon it. About a month after, the appellant summoned the respondent either to hold to

* The report of this, and of the three following cases, has been contributed by Mr. I. T. Wotherspoon, of Quebec.

his bargain and purchase the land for the amount previously agreed on, or else to quit and deliver it up. This, relying upon his receipt from the seignior, the respondent refused to do; but yet, from that time (Nov. 1863) until the institution of the action (Feb. 1864) he ceased to work upon the land, except in the absence of Guillemette, and whenever, during that period, he happened to meet him there, upon the appellant's ordering him off, he would leave promising never to return. Notwithstanding this, in February, 1864, Larochelle instituted an action *en complainte* against Guillemette, whereby he claimed damages to the amount of £60; inasmuch as on the 1st of February then instant, and at different times since, the said defendant had carried away a certain quantity of felled wood from the said land; and concluded that he might be declared to be the only true and lawful possessor of the lot in question. To this declaration the appellant answered by a *défense au fonds en fait*, and a perpetual peremptory exception *en droit*, pleading a contrary possession, and the non-fulfilment, by the respondent, of the verbal agreement already referred to; upon which pleas issue was joined. The evidence, as is usual in these cases, was contradictory; but from an analysis of it the above facts, at least, seem to be proved.

MONDELET, J., remarked, that the proof in this case was most extraordinary, being replete with contradictions, and served to show the necessity of country judges paying more attention to the taking of evidence before them. But it was evident that the respondent's possession was only one of *tolerance*, which did not entitle him to bring the action he did, and which possession, even supposing it to have been legal, he had abandoned to the appellant since November, 1863; that is, for four months before the *trouble de fait* complained of.

Judgment of the Court of Revision and of the Superior Court reversed with costs.

Henri T. Taschereau, for the Appellant.

Taschereau & Blanchet, for the Respondent.

DIONNE *et al.*, (defendants in the Court below) Appellants; and VALLEAU *et al.*, (plaintiffs in the Court below) Respondents.

Practice—Conclusions of declaration—Inscription.

Held, that the fact of a plaintiff attempting to capitalize interest already accrued, is not a sufficient ground for the dismissal of his action, although the Court may refuse to grant that part of it which claims such compound interest.

That notice that a cause has been inscribed upon the roll of enquêtes and merits, given with the prescribed delay before the day fixed, is sufficient, provided the cause is actually inscribed before the day fixed.

In this case, which was on a promissory note, the above points were decided.

Taschereau & Blanchet, for the Appellants.

Campbell & Hamilton, for the Respondents.

LARUE, (plaintiff in the Court below) Appellant; and EVANTUREL, (defendant in the Court below) Respondent.

Promissory Note—Forged Endorsement.

Held, that the holder of a promissory note, who has alleged that his title thereto is derived from an endorsement, which is afterwards proved to be a forgery, even although he may be acting in good faith, cannot recover the amount of the note from any of the previous endorsers.

This is a case which arose out of one of the numerous forgeries of Octave Crémazie, who fled the country on the 11th Nov., 1862; and was brought to try the title of the many holders of promissory notes drawn by him with certain endorsements, which, although forged, are yet, by the holders of the said notes, alleged to have been forged with the tacit consent of those whose names have been made use of.

The facts are as follows:—When Crémazie left Canada, Nazaire Larue, the plaintiff in this cause, found himself the holder of a promissory note, payable to the order of Jacques Crémazie, drawn by the firm of J. & D. Crémazie, signed by them, and endorsed with the names of Jacques Crémazie, François Evanturel, and Augustin Côté & Co. On the 22d Dec. following (1864), the day when the note became payable, it was duly protested for non-payment, and notice of the same served upon the endorsers.

In the spring of 1864, Larue brought his action against Evanturel, and in his declaration alleged the above facts, and further, that Augustin Côté & Co. had endorsed and delivered the note to him; that Evanturel had denied his signature, but as he had formerly been in the habit of endorsing for Crémazie, and knew that Crémazie had continued to use his name to give circulation to his notes, that he was liable to the plaintiff.

To this declaration the defendant pleaded by a *défense au fonds en fait* and a *défense au fonds en droit*, in which the principal allegation was that the signature of the defendant on the back of the said note was forged, and that the plaintiff could acquire no right of action from a forged title. After a long and voluminous *enquête*, Judge Stuart, sitting in the Superior Court, on the 9th Oct., 1865, gave judgment maintaining the defendant's plea. From this judgment the present appeal was instituted.

In arguing the appeal the respondent's counsel dwelt strongly upon the fact that the indorsement of Côté's name was a forgery; and in rendering judgment in his favour,

Duval, C. J., remarked, that the proof of the signature being genuine was the first and great link in the chain of evidence necessary to establish the plaintiff's claim; that all the judges were of opinion that the decision of the Court below should be confirmed, based as it was upon the forgery of Evanturel's signature, and that there was nothing in the criminal law of England (a point urged by the plaintiff) which could justify a civil action.

Judgment of the Court below confirmed.

Fournier & Gleason, for the Appellant.

Casault, Langlois & Angers, for the Respondent.

ENNIS, (plaintiff in the Court below) Appellant; and THE GRAND TRUNK RAILWAY COMPANY, (defendants in the Court below,) Respondents.

Saisie-Revendication—Institution of action.

Held, that the emanation of a writ of *saisie-revendication*, is an institution of an action within the meaning of 12 Vic. c. 30 (C. S. C. cap. 23), sufficient to entitle the grantee of timber limits, after the expiration of the

license which he holds, to proceed with such action in revendication against any person unlawfully holding timber which has been cut upon his limits, even if the declaration in the cause should not be served upon the defendant until after the expiration of the license.

That the defendant in an action in revendication is answerable, when the moveables seized were so upon his land, if he fails to properly inform the plaintiff in the cause who their real possessor is.

The judgment, from which this appeal was instituted, was rendered by *Gauthier, J.*, in the Superior Court, sitting at Montmagny, on the 17th January last, in an action of revendication, brought under Cap. 30 of the 12th Vic. (C.S.C. cap. 23), in which the points in issue were:—1st, The interpretation to be given to that portion of section 2 of the statute, which is couched as follows: "And such licenses shall entitle the holders thereof to seize in revendication or otherwise, such trees, timber or lumber where the same are found in the possession of any unauthorized person, and also to institute any action or suit at law or equity against any wrongful possessor or trespassers, and to prosecute all trespassers and other offenders to punishment, and to recover damages if any: and all proceedings pending at the expiration of any such license may be continued to final termination as if the license had not expired;" and 2nd, Whether the Grand Trunk was in possession of the property seized.

The facts of the case were as follows:—On the first of March, 1858, the plaintiff obtained from Charles Dawson, agent of the Crown timber lands, a grant of power and permission to cut all kinds of timber upon certain lands in the townships of Bourdages and Lessard, with the right of possessing and occupying the said location to the exclusion of all others, from the 1st November, 1857, until the 30th April, 1858.

On the 29th March, 1858, the affidavit which necessarily preceded the emanation of the writ of *saisie-revendication* in this cause, was sworn to. On the 29th of April, 1858; (during the continuance of the license) the said writ issued; but was only executed on the first of May, 1858, and the declaration in the cause was served some time afterwards.

By his declaration the plaintiff alleged his license as above, and stated that he had fulfilled the conditions which it imposed upon him; further, that the defendants in the cause, since the 15th November previous, until that date, in contravention of the license, and the Provincial statute above cited, without the permission and against the will of the plaintiff, had cut, and caused to be cut by their agents and employees, within the limits described in the license, a quantity of over 5000 cedar stakes, of the value of \$5 a hundred, and 3200 cedar pickets of the value of \$3 a hundred, making together the sum of £86.10s. currency &c., and concluded as in an ordinary action in revendication.

To this declaration the defendants replied simply by a *défense en fait*, whereupon issue was joined and the parties proceeded to proof.

Under the above mentioned writ of revendication, it is necessary here to remark, the sheriff to whom it was addressed seized 6136 cedar stakes, and 2256 pickets upon the land belonging to the G. T. R. Co., in the parishes of L'Islet and Cap St. Ignace, in the district of Montmagny.

At the *enquête* in the case it was proved in favor of the plaintiff, 1st, that a license had been granted to him, as stated in his declaration; 2nd, that the conditions of this license had been fulfilled; 3rd, that the wood revendicated in this cause had been cut upon his grant between the 1st November, 1857, and the 30th April, 1858; 4th, that this wood had been transported to the defendants' land where it was seized; and 5th, the value of this wood. The defendants, on the other hand, proved, that this wood belonged to sub-contractors of the company and was destined to their use, and had not been delivered to the Railway Company, although they did not allege this in their pleading.

Upon this case the Superior Court rendered the following judgment: The Court having heard &c: Considering that the present action was only instituted by the said plaintiff, after the first of May, 1858, after the expiration of the time and period of the license or permission of the said plaintiff, mentioned in the declaration in this cause; considering that by law it is declared that all actions pending at the

expiration of any such license, shall and may be continued in the same manner as if the said license had not expired; considering that it is established that the wood seized in this cause was so, being neither in the possession nor the property of the said defendants, but of their contractors for the line of railroad, dismisses the present action with costs."

The plaintiff having appealed, this judgment was reversed with costs.

Fournier & Gleason, for the Appellant.

Lelièvre & Caron, for the Respondents.

RECENT ENGLISH DECISIONS.

EQUITY CASES.

Charity—Grammar School.—Upon evidence of the decrease in value, during the last thirty years, of the property of the Free Grammar School, founded at Manchester in the reign of Henry VIII., and of the impossibility, for want of funds, of fully carrying out the extended system of gratuitous education, including instruction in modern languages and the physical sciences, which was sanctioned by a scheme settled in 1849, the Court, having regard to the manifest intention of the founder, not to make it a school for the poor only, but to establish a liberal system of education, so as to fit boys for the university, allowed the admission of boys, beyond the existing number of free scholars, on payment of capitation fees, which should be applied in increasing the educational funds, and not paid to the masters directly. To obviate any invidious separation of the boys into two classes of rich, or paying, and poor, or non-paying, the Court at the same time directed that, for the future, admission to a gratuitous education upon the foundation should depend upon proficiency in examination, without reference to the means of the parents. *Manchester School Case*, 1 Eq. 55. This case is interesting in an antiquarian point of view. The *Manchester Free Grammar School* was founded in the reign of Henry VIII., by Hugh Oldham, Bishop of Exeter, and endowed with property then stated to be of the yearly value of £40, including the corn-mills of the town. The stipend of the "high master" was fixed at £10 a year, and £5 a year for the usher. In 1833, the net annual income of the charity, which was principally derived from the *mono-*

poly of grinding malt for Manchester at the school mills, had increased from £40 to £4000. Soon after this date the Court of Chancery, in order to make use of the surplus funds, directed an extended system of strictly gratuitous education; but, at the present time, in consequence of most of the Manchester brewers having removed out of the city limits, in order to escape the offensive tax for grinding malt, the profits of the school mills had dwindled down to £372, and it became necessary to see how the revenue of the charity could be supplemented. This was effected by admitting paying scholars, the privilege of entering on the foundation being reserved to lads of superior ability, in order to prevent any invidious distinction between the rich and the poor.

Policy — Deposit — Bankruptcy.—Bankers with whom policies of insurance were deposited by the assured as security, gave no notice in writing to the offices, though the secretaries were casually made aware of the fact of the deposit. The assured became bankrupt and died. On bill by the assignees, *Held*, that the policies remained in the bankrupt's order and disposition, and that his assignees were entitled to the proceeds, less the premiums paid by the bankers. *Edwards v. Martin*, Eq. 121. This action was instituted by the assignees of one Glenn, a bankrupt, against certain bankers with whom Glenn had deposited two policies of insurance, one in the *Victoria Life*, and the other in the *Britannia Life Assurance Company*, to secure a debt due from him. The deposit was not accompanied by any deed or memorandum. The secretaries of the companies deposed that it was the practice in the offices of their companies to enter the particulars of all notices of assignments forthwith, after the receipt of them, in books kept specially for that purpose; that verbal notice would not be recognized, at all events, unless the particulars were specially entered at the time. The secretary of the *Britannia* recollected that Glenn had made a casual statement, in the course of general conversation, that the policy was held by his bankers, but no memorandum was made. Vice-Chancellor Stuart said: "The only question is as regards notice to the insurance companies, and I think the evidence shows that no sufficient

notice was given. It is, therefore, plain, upon the authorities, that the right of the assignees to the proceeds of the policies has not been displaced."

Bankruptcy — Composition — Secret bargain.—On a bill by a bankrupt, who had compounded with his creditors for eight shillings in the pound, and where bankruptcy had been annulled, the Court set aside, with costs, a secret bargain, whereby the bankrupt agreed to pay one creditor in full, in consideration of his becoming surety for payment of the composition.

Vice-Chancellor Stuart observed: "Upon the principle laid down by Lord *Eldon*, in the case of *Jackman v. Mitchell*, it is impossible that this transaction can stand. In this case, one creditor, without the knowledge of the body of the other creditors, gets more than double the amount received by them. It is not, however, the amount that vitiates the transaction. It cannot be said that a private bargain, by which one creditor secretly obtains an advantage for himself, is a bargain for the benefit of the other creditors, because the secrecy puts them to this disadvantage, that but for the secrecy they might be willing to forego the guarantee in consideration of receiving a higher rate of dividend. It is plain that the concealment prevented them from exercising this option." *Wood v. Barker*, Eq. 139. (Vide *Sinclair and Henderson*, 1 L.C. Law Journal, p. 54.)

Sewage—Nuisance.—Injunction granted to restrain commissioners for draining a town, from causing the sewage to be discharged into a stream passing through the plaintiff's land, and feeding a lake therein situated, when the sewage injuriously affected the water of the stream and lake, and had done so for some years, and the pollution of the water perceptibly increased as new houses contributed their sewage to the stream. *Semble*, in such a case no prescriptive right could be claimed by the commissioners to discharge the sewage through the stream.—Sir J. Romilly, M. R., said: "I think the evidence in this case establishes that the sewage water from the town of *Tunbridge Wells*, which flows into the brook which passes through the plaintiff's land, injuriously

affects the water in that brook, and also the water of the lake in the park of the plaintiff. I think, upon the evidence, that it has done so for a considerable time; that it has increased of late; and that it is perceptibly increasing from time to time, according as fresh houses contribute their sewage to the brook. This is a matter of very great importance; and it has been suggested to me in argument, as a matter that ought to be regarded, that private interests must give way to public interests, that the Court ought to regard what the advantage to the public is, and that some little sacrifice ought to be made by private individuals. I do not assent to that view of the law on the subject. My firm conviction is, that in this, as in all the great dispensations and operations of nature, the interests of individuals are not only compatible with, but identical with the interests of the public; and although in this case I have only to consider an injury to a private individual, yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the public and the Court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle, and contagious diseases affecting human beings, such as cholera or typhus and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting, even partially, a stream which flows a considerable distance." *Goldsmid v. Tunbridge Wells Improvement Commissioners*, Eq. 161.

Release—Covenant.—A voluntary declaration by a creditor, that he intends to release his debtor from a debt, though not amounting to a release at law, may, nevertheless, be held in equity to be a representation which the creditor is bound to make good. Where, there-

fore, a mortgagee, on hearing that his son-in-law, the mortgagor, was about to sell the mortgaged property, (a house occupied by the mortgagor,) in order to pay off the debt, wrote that he might continue to live there without paying any rent, it was held that the mortgagor was entitled to redeem, on paying the principal, together with interest from the last day on which interest fell due, previously to the death of the mortgagor. *Yeomans v. Williams*, Eq. 184.

User—Dedication.—A dedication from user can only be presumed in favour of the public generally, and not in favour of the inhabitants of a particular parish. *Vestry of Bermondsey v. Brown*, Eq. 204.

Company—Contract to take Shares.—The *Leeds Banking Company* having decided upon issuing their reserved shares, addressed a circular to the shareholders, offering them one new share for every five shares held by them, to be paid for on a day named, and requesting to know whether, in the event of any shares remaining, they would wish to have any additional shares. *Addinell* was offered four shares in respect of the twenty held by him, and in answer to the circular he agreed to take his proportion of allotment, and asked for additional shares if he could have them. The reply stated that the directors had allotted him four extra shares in addition to the four shares already accepted by him. In this reply there was a further clause not contained in the first circular, that if the amount were not paid by the day named, the shares would be forfeited. Nothing further was done, and no payment was made in respect of any of the shares:—**Held**, that a contract was constituted in regard to the first four shares by the offer and the acceptance; but the contract was not complete as to the four extra shares, by reason of the clause of forfeiture, which was a new term added to the contract and not accepted by payment within the time specified. *Addinell's case*, Eq. 225.

Nominal Consideration.—A nominal consideration being expressed in a deed, does not prevent the admission of evidence *abunde* of the real consideration, provided such real consideration be not inconsistent with the deed. *Leifschild's case*, Eq. 231.

Marriage in England—Divorce in Scotland.

—A testator in England gave and devised real and personal estate, situate in England, to his great-niece for life, with remainder, as to the personalty, to her children, and as to the realty, to her first and other sons lawfully begotten, with remainders over. The great-niece, in 1830, married in England, but never lived with her husband, and a decree of divorce *a vinculo*, on the ground of the husband's adultery, was pronounced by the Court of Session in Scotland, the husband having been induced, with the wife's connivance, to go to Scotland, to bring himself within the jurisdiction of the Scotch Courts. The great-niece, in 1846, married in Scotland an Englishman domiciled there, and had by him two daughters and a son, all born in Scotland, during her first husband's lifetime. Upon petition by these three children claiming as children, the son claiming also as eldest son lawfully begotten, two funds representing portions of the testator's real and personal estate, which had been paid into Court:—*Held*, that the English marriage being indissoluble, the decree of divorce pronounced by the Court of Session must be treated as a nullity; that the second marriage in Scotland was invalid, and therefore that the children, whatever might be their *status* in Scotland, must in England be treated as illegitimate; and could not, upon the construction of an English will by an English court, be held to come within the term "children" or "eldest son lawfully begotten," as used in such will, and were not entitled to the funds in Court.

The circumstances under which the questions arose were of a somewhat remarkable character. In 1828, *Elizabeth Hickson*, (the grand-niece referred to above,) being then a girl of about sixteen, was induced by fraud, without the knowledge of her family, to consent to a marriage with a farmer named *Buxton*. The marriage was solemnized at Manchester on the 10th of June in that year; but on the same day her friends interfered and got possession of her, and separated her from her husband, and they never lived together for a single day. *Buxton* was indicted for his conduct in bringing about the marriage, and convicted and sentenced to three years' imprisonment.

Steps were taken to procure an Act of Parliament to dissolve the marriage, but without success. After many attempts to recover possession of his wife, *Buxton*, in 1838, was induced, in consideration of an annuity during the joint lives of himself and his wife, to consent to a deed of separation, which was accordingly executed in December, 1838. No question was raised as to the validity of this marriage with *Buxton*. In 1844, one *Shaw*, who was then a student of *Gray's Inn* preparing for the bar, fell in love with *Elizabeth Hickson*, or Mrs. *Buxton*. His addresses were favourably received, but the existing marriage with *Buxton* was a bar to their wishes. In order to remove that impediment the parties devised the scheme of procuring a dissolution of the marriage with *Buxton*, by a sentence of the Court of Session in Scotland, on the ground of adultery committed by *Buxton*; and in order to give that Court jurisdiction, *Buxton* was prevailed upon by pecuniary inducements to go and remain in Scotland for forty days, and thereupon Mrs. *Buxton* raised an action against him in the Court of Session, for a divorce on the ground of adultery, which there was no doubt he had committed. The suit was carried on with all due solemnity, and it ended in a sentence of divorce *a vinculo* being pronounced by the Court on the 20th of March, 1846. On the 17th of June, 1846, a marriage was solemnized at Edinburgh between John Shaw and Elizabeth Buxton, who thenceforth resided in Scotland as man and wife. Vice-Chancellor Kindersley remarked, that the English marriage was indissoluble, (the Divorce Court not being in existence at the time of these transactions,) and if the validity of the marriage with *Shaw* were to be recognized by English Courts, the consequence would necessarily follow, that an English Court of justice must hold that Elizabeth Hickson had two husbands simultaneously, *Buxton* and *Shaw*. *Wilson's Trusts*, Eq. 247.

Trade Mark—Measure of Damage—Onus probandi.—On an inquiry whether any and what damage has accrued to the plaintiffs from an unlawful use by the defendant of their trade mark, the onus lies on the plaintiffs of proving some special damage by loss of custom or otherwise; and it will not be intended,

in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade mark would have been sold by the plaintiffs, but for the defendant's unlawful use of the plaintiffs' mark. Vice-Chancellor Wood observed: "There were, or there may have been, persons licensed by the plaintiffs to use their trade-mark and to sell goods manufactured by their process; or there may have been, and doubtless were, persons who had purchased from the plaintiffs, with a view of selling again; how can the court assume that the supposed purchasers would have passed by all these persons, and have purchased direct from the plaintiffs? Yet this is what the Court is called on to infer from the mere fact that certain goods were sold by the defendant, and that some of those goods were marked with imitations of the plaintiffs' marks. Principle would seem to determine that no such assumption can be made, and that it lies on the plaintiffs to prove some distinct damage from the use of their trade-mark, by showing loss of custom or something of that kind, which has not been done in this case." *Leather Cloth Co. v. Hirschfeld*, Eq. 299.

Company—Forfeiture of Shares.—A shareholder in a company received a notice that on non-payment by him of arrears of calls on a certain day, his shares "would be forfeited without further notice." He also knew that the question of winding up the company was under consideration. Two days before the day appointed for the payment of the arrears, he went to the company's office, paid the arrears on a few of his shares, and took a receipt, saying that on the rest he should submit to a forfeiture. The directors, at a board meeting, five days afterwards, examined the list of defaulters, and declared the shares of some of them, whom they considered as not solvent, to be forfeited; but they did not declare the shares of this particular shareholder to be forfeited; and they continued to treat him as the holder of the whole number of shares. The articles of association of the company provided, that "in the event of non-payment at the time and place appointed by the notice, any share might thereupon be forfeited without any further act to be done by the company:"—

Held, that the shares upon which the

arrears were not paid up, were not absolutely forfeited by the non-payment, and that the company's right of option remained; and, as the company had declared their intention of retaining the shareholder on the list, that he must, upon winding up, be held to be a contributory in respect of the full number of shares. *Bigg's Case*, Eq. 309.

Attestation of Deed.—A deed attested by one witness, though executed and acknowledged for the purpose of enrolment, in the presence of two persons who are parties to and execute the deed, but do not sign the attestation clause, is not a deed sealed and delivered in the presence of two or more credible witnesses. *Wickham v. Marquis of Bath*, Eq. 17.

QUEEN'S BENCH.

Principal and agent—Liability of principal for act of agent.—A. employed B. to manage his business, and to carry it on in the name of "B. & Co."; the drawing and accepting bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of "B. & Co."—*Held*, that A. was liable on the bill in the hands of an indorsee, who took it without any knowledge of A. and B., or the business.

In this case Jones, the principal, had strictly forbidden Bushell, his agent, to accept bills, and finally dismissed him for having done so on several different occasions. Several of the bills had been paid at maturity, being made payable at the bank where Jones had an account, but payment of one, for £194, was refused, and this gave rise to the action. Cockburn, C. J., remarked: "The defendant carried on business both at Luton and in London. In London the business was carried on in the name of Bushell & Co., Jones at the same time employing Bushell as his manager; Bushell was therefore the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business. That being so, the case falls within the well-established principle, that if a person employs another as an agent in a character which involves a particular authority,

he cannot by a secret reservation divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary as incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and Bushell cannot be divested of the apparent authority, as against third persons, by a secret reservation. I think Jones was properly held to be liable on the bill." *Edmunds v. Bushell*, Q. B. 97.

Railway—Lands injuriously affected.—The owner of a house, none of whose lands have been taken for the purposes of the railway, cannot recover compensation in respect of injury to the house depreciating its value, caused by vibration, smoke, and noise, in running locomotives with trains in the ordinary manner, after the construction of the railway. *Brand v. Hammersmith and City Railway Co.*, Q. B. 130.

COMMON PLEAS.

Nuisance—Negligence—Occupier.—The plaintiff, in passing along a highway at night, fell into a "hoist hole," which was within fourteen inches of the public way and unfenced. The hole formed part of an unfinished warehouse, one floor of which the defendants were permitted to occupy whilst a lease was in course of preparation, and the aperture was used by the defendants in raising goods from the basement to an upper floor:—*Held*, that the defendants had a sufficient occupation of the premises to cast upon them the duty of protecting the hoist-hole; and that the hole was near enough to the highway to constitute a nuisance. *Hadley v. Taylor*, C. P. 53.

Bill of Lading—Power to Shipowner to land Goods.—By proviso in a bill of lading, simultaneously with the ship being ready to unload the whole or any part of the goods, (forty pipes of lemon juice,) the consignee was bound to be ready to receive the same from the ship's side; and in default, the master or agent of the ship was authorized to enter the goods at the Custom House, and land, warehouse, or place them in lighters at the risk and expense of the consignee. After part of the goods had been landed by the shipowner,

but not before, the consignee was ready and offered to receive the remainder, but the shipowner refused to deliver them to him, and landed them himself:—*Held*, that the contract was divisible; and that unless the shipowner had been prejudiced in the delivery of the remainder, by the default of the consignee in not being ready to receive the whole, he was bound to deliver them. *Wilson v. London, Italian, and Adriatic Steam Navigation Co.*, C. P. 61.

Partnership—Agency—Perception of profits.—S., being about to commence business as an underwriter at Lloyd's, through the agency of one Fenn, in consideration of the defendant (the father of S.) engaging with Fenn to hold a sum of £5000 available for his son, for the purpose of carrying out the arrangement, gave the defendant the following memorandum:—"In consideration of your guaranteeing me to the extent of £5000 in my business of underwriter, until by such business I shall make or acquire from the profits thereof £5000 after providing for all known losses, I hereby promise and agree to pay to you, during your life, in case I shall so long live, an annuity of £500, being equal to 10 per cent. per annum on £5000; and further, that, if at the end of three years from the date hereof, it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than £500, the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years;" and the memorandum concluded with these words:—"moreover, in no case are you to be considered as a partner with me in the said business of an underwriter:"—

Held, by the Exchequer Chamber, in accordance with the judgment of the Court of Common Pleas, that the above memorandum did not constitute the defendant a partner with his son.

By a settlement afterwards made on his marriage, S. assigned to the defendant and one D., as trustees, "all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of Fenn,

and all such as shall hereafter come into the hands of Fenn, on account or in respect of the said underwriting business." The deed also contained a power of attorney, authorizing the defendant and his co-trustee to receive *the whole proceeds of the business*; and the first trust was, to pay the defendant £500 a-year, with an additional sum when the profits of the business should have realized a given sum, and a covenant, that, when the accumulated profits should have reached £8500, and continued at that amount without reduction for two years, the trustees should re-assign to S. "the said moneys and *profits* arising from the aforesaid underwriting business."

In an action upon a policy signed by Fenn in the name of S., a special case was stated, in which were set out the above-mentioned memorandum and marriage settlement, and by which it was agreed that the Court should draw any reasonable inferences of fact:—*Held*, by the majority of the Exchequer Chamber,—reversing the judgment of the Court below,—that the marriage settlement did not, either alone or in conjunction with the memorandum, render the defendant liable as a partner with S. in his underwriting business. *Held*, by Pigott, B., and Shee, J., that the effect of the settlement was, to give the defendant such a substantial interest in the business as to render him liable as an insurer on the policy. *Bullen v. Sharp*, C. P. 86. [In the opinions of the judges who sat in this case will be found a very full and interesting discussion of the question—what will make a person liable as a partner? The dissenting judges stated their views with great energy and distinctness, and Mr. Justice Blackburn and Barons Channell and Bramwell with equal force and emphasis on behalf of the majority of the Court. Baron Channell observed: "I think that henceforth we may take it that the true test, where a person is sought to be made liable on the ground of his being a partner, is to see whether he has constituted the other alleged partner *his agent in respect of the partnership business*; and that, taking a part of the profits, though cogent evidence of this, is not conclusive. Mere participation in the profits is not sufficient to make a man

bound by alleged partnership contracts, if the facts show that he had not constituted the other his agent." Baron Bramwell was still more emphatic. In the course of his remarks he observed: "They say that the defendant is a partner with his son; and that, if not partners *inter se*, they are so as regards third parties. A most remarkable expression! Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean *inter se*; for, partnership is a relation *inter se*, and the word cannot be used except to signify that relation. * * * How many men in a thousand, not lawyers, could be got to understand, that, of the two servants of a firm, the one who received a tenth of the profits was liable for its debts, and the other who received a sum equal to a tenth was not? This Mr. Justice Story calls 'satisfactory.' (*Story on Partnership*, § 32.) Satisfactory in what sense? In a practical business sense? No; but in the sense of an acute and subtle lawyer, who is pleased with refined distinctions, interesting as intellectual exercises, though unintelligible to ordinary men, and mischievous when applied to the ordinary affairs of life. Lord Eldon did not think it satisfactory. Such a law is a law of surprise and injustice, and against good policy. It fixes a liability on a man contrary to his intent and expectation, and without reason, and gives a benefit to another which he did not bargain for and ought not to have, and prevents that free use of capital and enterprise which is so important."]

PROBATE AND DIVORCE.

Judicial Separation—Adultery.—A charge of adultery, in a suit by a wife for judicial separation, rested upon the evidence of one witness, who was a woman of loose character. The Court, without deciding affirmatively whether or not the adultery charged had been committed, declined to pronounce a decree upon her uncorroborated testimony, and dismissed the petition. *Ginger v. Ginger*, P. & D. 37.

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VOL. II. DECEMBER, 1866. No. 6.

CONTEMPT OF COURT.

In our previous notices of the *LAMIRANDE* case, we have mentioned the proceedings taken against Mr. T. K. RAMSAY, and also against Mr. LUSIGNAN, for contempt of Court. When the argument on the rule against Mr. RAMSAY at last came on, in the end of October, Mr. RAMSAY contended that the letters which he had written to the *Gazette* were merely answers to charges made against him by Mr. Justice DRUMMOND, contained in certain reports printed in the *Herald*, for which he held the judge responsible. Mr. Justice DRUMMOND having denied that he intended to charge Mr. RAMSAY with being one of the conspirators in the *LAMIRANDE* affair, or with having been a party to the alleged falsification of the GOVERNOR'S warrant, Mr. RAMSAY replied that he, on his part, would consent to withdraw what was offensive in his letters, in consideration of Mr. Justice DRUMMOND having disavowed any intention to criminate him, in making use of the expressions complained of.

On the 3rd of November, final judgment was rendered. As a writ of error has issued, and the case will be heard before the full Court of Queen's Bench, we shall not take up space here with the remarks made by Mr. Justice DRUMMOND in giving judgment. Suffice it to say that he made the rules absolute, and fined Mr. RAMSAY in the sum of £10. Mr. LUSIGNAN was also fined in the sum of 20s., which was paid. Mr. RAMSAY immediately procured the issuing of a writ of error to the Appeal Side of the Court of Queen's Bench. The following reasons, extracted from the record, are the grounds relied on by the plaintiff in error:—

"T. K. RAMSAY *and* THE QUEEN. — And now, that is to say, on the — day of —, in the year of Our Lord, 1866, comes the said T. K. Ramsay in person into Court, and says that in the record and proceedings aforesaid, and also in the rendering of the judgment in

the said case, there is manifest error, in this, to wit, that the said rule does not contain any contempt or offence which, by the laws and statutes of this Province, a justice sitting in and holding the Court of Queen's Bench, without the assistance of a jury, had any authority or jurisdiction to hear and determine; wherefore in this there is manifest error.

"There is also error in this, that the learned judge who gave the judgment, to wit, the Hon. Mr. Justice Drummond, was himself a party to the prosecution, being complainant as to the contempt of the Court of Queen's Bench alleged, which did not take place in view of the said Court, or in view of the said judge; wherefore in that there is manifest error.

"There is also error in this, that there was no affidavit in support of the said complaint; wherefore in that there is manifest error.

"There is also error in this, that the letters mentioned in the rule taken in this cause are not alleged to have been written by the said plaintiff in error, nor does it appear by the record that they were written by him; wherefore in that there is manifest error.

"There is also error in this, that if the said letters have been written by him, they do not contain any contempt of the Court of Queen's Bench, being such answers as plaintiff in error had a right to make to certain public reports therein referred to, and the said answers were the legitimate defence to the slanders contained in the said reports; wherefore in that there is manifest error.

"There is also error in this, that even if they did contain any contempt of the said Court, the said contempt was condoned and passed over by the said Court long previous to the taking of the said rule; wherefore in that there is manifest error.

"There is also error in this, that in and by the said rule, it is not alleged, nor does it appear, that the alleged contempt was committed within the jurisdiction of the Court which adjudicated thereon; wherefore in that there is manifest error.

"There is also error in this, that it appears that the said judge was not acting in his judicial capacity at the time the remarks made by him, and reported in the *Herald*, were

made; wherefore in that there is manifest error.

"Wherefore he prays the judgment of the Court here, upon the premises, and that the judgments and proceedings aforesaid should be reversed and made void; and that the said T. K. Ramsay should be restored to all things which by reason of the judgments and proceedings aforesaid he could have lost."

We understand that the case will not be in a position to be argued before the full Court till the March Term.

THE QUEEN AGAINST JAMES MACK.

The case of JAMES MACK, who was convicted of murder at the last term of the Court of Queen's Bench, and executed on the 23rd of November, may well arrest our attention for a few moments.

The prisoner was a young man, a driver in one of the Batteries of Royal Artillery, stationed at Montreal, bearing a fair character, not addicted to intemperance, who, one evening in July last, cut the throat of Corporal SMITH, of the same Battery, and then proclaimed himself the doer of the deed, in the hearing of those who hastened to the spot. It appears from the evidence of a comrade, named BURTON, the only one in the Battery who seems to have been in the confidence of the prisoner, and to have sympathised with him in his troubles, that the corporal was in the habit of reproving and reporting MACK, for alleged acts of negligence, and breaches of discipline; that he would frequently take advantage of an officer being within hearing to find fault with the prisoner, for something wrong about his horses or his harness, though in the opinion of his comrade, MACK kept everything in as good order as any other driver in the Battery. It must be difficult, nay, impossible, for persons mixing in active life, and having their sensitiveness dulled by contact with men of all classes and characters, to conceive the degree of irritation created in the mind of a man bound down to the routine of a monotonous service, with no escape from the petty tyranny of one only a step above him. We can but judge of its intensity by the terrible results. Not to speak

of the hideous suspicions entertained that in battle many officers fall by the hands of their subordinates, we have the constantly recurring fact of non-commissioned officers being murdered by their men, for causes inconceivably trifling—murdered recklessly, by men not caring for escape, like the murderer who springs with his victim from the height of a precipice, and perishes with him in the fall. And where this gnawing rage and exasperation do not end in murder, there is ample room to believe they frequently lead to suicide.

In the case before us, the driver MACK had been labouring under a sense of wrong and injury for many weeks previous to the commission of the deed. While out with the "flying column," during the Fenian raid, the prisoner was, in his own opinion, led the life of a dog. He had the care of six horses, and Corporal SMITH, by constantly finding fault, and subjecting him to punishment, seems to have harassed him beyond endurance, though the corporal was probably ignorant of the deadly hatred he was exciting. Half an hour before the murder, MACK had just been ordered to do extra pack drill. The evidence of BURTON, to which we have already referred, shows that the prisoner reasoned with himself that if he struck the corporal, the punishment sure to follow would be so disproportioned to the pain inflicted on his persecutor, that it would be no satisfaction to him, and thus at length he came to the dreadful resolution to be on equal terms with his adversary, by taking his life, and allowing his own to be the forfeit.

This is one view of cases of this class. But there is another possible view. We all know that it is a common, every-day occurrence, when a man cuts his own throat, or terminates his existence in any other way, for the Jury to say that he did it while labouring under temporary mental derangement. This verdict passes unquestioned in the case of a soldier, as well as of any other person. And it is by no means an unfrequent occurrence for a soldier to commit suicide. We have heard of several cases in this city within a few years; and, rather strange to say, the very day we were writing these lines, our eye was attracted by the following paragraph, in a newspaper, of date October 17th. "Quebec,

Oct. 16.—A private of the 30th Regiment, named Swallow, committed suicide at the camp at Levis yesterday, by cutting his throat with a razor. No reason assigned for the deed." No doubt the stereotyped verdict was rendered in this case; and yet if SWALLOW had taken a fancy to cut some other person's throat instead of his own, would he not have surely suffered death as a wilful murderer?

We make these observations without the slightest disposition to impugn the fairness of the prisoner's trial, or to complain of his sentence. The forms of justice were, no doubt, carefully observed. The plea of insanity was urged by the prisoner's counsel—counsel, however, assigned to him by the Court only on the morning of the trial. The learned judge, we believe, referring to this defence, laid some stress upon the fact, as bordering on insanity, that the prisoner during the night after the murder, expressed his satisfaction at what he had done, and said there were three or four more in the Battery, that he would like to do the same to. But the judge added that this was too slender a basis for such a defence to rest upon, and that were we to enter into a fine analysis of human acts, nine-tenths of our fellow men would seem to be insane.

It must be observed, however, that the plea of insanity being an affirmative plea, the proof of which lies upon the prisoner, and the very truth of which prevents the prisoner from doing anything for himself, it is highly improbable that a reckless, unhappy man, generally without means or friends, should be successful in establishing it. His comrades would expose themselves to imputations of disaffection, and sympathy with the crime, if they displayed too lively an interest on his behalf; and however strangers may commiserate, they are generally either ignorant of how the case really stands, or satisfy themselves with the reflection that their interposition could do no good.

When the community is startled by the intelligence of a ferocious crime like that committed by MACK, the exigencies of military discipline, the laws of the state, the blood of the murdered man, cry aloud for summary vengeance upon the murderer. But no punishment will be sufficient to deter men from crimes

of this description. The murderer counts the cost, and is willing to pay the penalty. In this case, so suddenly and stealthily was the act committed, that the first impression was that Corporal SMITH had committed suicide, but MACK disabused the minds of the bystanders, and avowed himself the criminal. It is manifest that we must look for other means of prevention. Whether these can be found in rendering it possible for a soldier to exchange his regiment or company, or in facilitating the purchase of discharges, when men find themselves unhappily circumstanced, it is hardly within our province to discuss. These are suggestions for the philanthropist rather than for the lawyer.

THE BAR OF LOWER CANADA.

Most of our readers are probably aware that an Act amending the Act respecting the Bar of Lower Canada was passed last session, and that new By-laws in conformity therewith have been made by the General Council, and also by the Councils of Sections. One of the new regulations is that a list of the advocates entitled to practice in Lower Canada shall be made and posted up. A notice has been issued by Mr. GONZALVE DOUTRE, secretary-treasurer to the General Council, that this general list will be made and completed on the 15th December, to be homologated and posted up according to law on the 1st January, 1867. Advocates admitted since the 30th of May, 1849, whose diplomas have not been registered in the Registers of the General Council, are requested to send them to the secretary before the 15th of December for registration. It is important that this list should be as accurate and complete as possible; and we therefore trust that members of the bar will endeavor to second Mr. DOUTRE in the carrying out of his task, which, we may add, is performed without any pecuniary remuneration.

The following is a list of Diplomas registered in the Registers of the General Council, from the nomination of the members of the Council, viz., 5th October, 1866, up to the 21st November, 1866.

NAMES.	WHERE ADMITTED.	DATE OF COMMISSION.	DATE OF REGISTRATION.
Butler, Thomas Page...	Montreal...	27 Sept., 1866	15 Oct., 1866
Bélanger, Ls. Charles....	St. Francis.	8 Oct., 1866	18 Oct., 1866
Benoit, Gab. Alphonse...	Quebec.....		
Belue, Jos. Tréfilé.....	Montreal...	19 Aug., 1863	19 Nov., 1866
Bouchette, A. Frederick..	Quebec.....	23 Nov., 1865	21 Nov., 1866
Caron, Onésime.....	Quebec.....	6 Oct., 1866	6 Nov., 1866
Drolet, Gustave A.....	Montreal...	16 Oct., 1866	31 Oct., 1866
Farmer, William O.....	Montreal...	17 Oct., 1866	24 Oct., 1866
Jacques, Alphonse....	Montreal...	17 Oct., 1866	18 Oct., 1866
Noyes, John Powell.....	Montreal...	17 Oct., 1866	24 Oct., 1866
Pouliot, Joseph N.....	Montreal...	10 Sept., 1866	6 Nov., 1866
Prévost, Oscar.....		30 Oct., 1866	7 Nov., 1866
Pelletier, Honoré Cyrias.	Quebec.....	8 Oct., 1866	20 Oct., 1866
Ronayne, Jn. Tellier, Ls.	Montreal...	7 Nov., 1866	19 Oct., 1866
Vallee, Jean Baptiste....	Montreal...	9 Nov., 1866	19 Nov., 1866

HABEAS CORPUS.

On the 25th of September, before Mr. Justice Drummond, in the Court of Queen's Bench, Crown side, Mr. Doutre, Q. C., moved that the rule of practice, requiring twenty-four hours' notice to be given to the counsel for the Crown, of applications for habeas corpus, be dispensed with. He referred to the Lami-rande affair as an instance of the danger of delay in certain cases.

On the 20th of October, Drummond, Badgley, and Mondelet, JJ., being on the bench, judgment was given rejecting the motion, on the ground that no rule existed on the subject, the practice being that the writ might be ordered to issue at once, or notice be required, in the discretion of the judge before whom affidavits were laid. The practice of giving notice to the Crown, added their Honors, had always existed, but whether the notice should be given before or after the issuing of the writ, was in all cases matter for consideration. Each case must be judged on its merits.

LORD CRANWORTH.

The following notice of Lord Chancellor CRANWORTH, who retired from the wooolsack on the change of ministry in July last, is from the *Times*:—

"The Great Seal will pass to-day, for the

second time, from the hands of Lord Cranworth to those of Lord Chelmsford; and, as no man of seventy-five can look forward to the reversion of a laborious office, we may regard the career of the present Lord Chancellor as virtually closed. If it has not been an eminently brilliant, it has been an eminently fortunate and honorable career. Lord Cranworth has not only proved himself *par negotiis*, but has earned the respect of the bar and the public in more various capacities than any one of his legal contemporaries. It is now exactly fifty years since he was first called to the bar, and thirty-two since he became solicitor-general, under Lord Melbourne's government; a post which he resumed after the short administration of Sir Robert Peel, and held until he was made a Baron of the Court of Exchequer, in 1839. Although his practice had been confined to the Courts of Chancery, Baron Rolfe acquired a high reputation as a common law judge; and the manner in which he conducted the famous trial of Rush has been remembered ever since as a signal proof of his judicial ability. Upon the resignation of Lord Cottenham in June, 1850, he was appointed one of the Commissioners of the Great Seal; and, in the same year, succeeded Sir Lancelot Shadwell as Vice-Chancellor, and was raised to the peerage. In October, 1851, he became one of the Lords Justices in Appeal in Chancery; and, at the end of 1852, he accepted the chancellorship, vacated by Lord St. Leonards. This office he retained for more than five years, under Lord Aberdeen and Lord Palmerston successively; nor was it until February, 1858, that he gave place to Lord Chelmsford. During this period, it was Lord Cranworth's misfortune to be unequally yoked, for many official purposes, with an attorney-general whose rare intellectual vigor and zealous advocacy of law reform contrasted with his own slower and more cautious temperament. His patience, however, his honesty of purpose, and his conciliatory disposition, here stood him in good stead; and he carried with him the good-will of the Chancery bar when he quitted the wooolsack. Upon the return of Lord Palmerston to power in 1859, Lord Campbell was made Lord Chancellor, and was followed by Lord Westbury;

but, after the memorable fall of the latter, about this time last year, Lord Palmerston, who could ill spare the services of Sir Roundell Palmer in the House of Commons, again offered the chancellorship to Lord Cranworth, who has filled it with credit ever since. No one would venture to claim for the retiring Chancellor such fame as has been won by some of his predecessors, two of whom, and not the least illustrious, are still living at a very advanced age. In depth of learning, he cannot be compared with Lord St. Leonards, nor in versatility of genius with Lord Brougham. Neither learning nor versatility, however, nor both combined, are sufficient to constitute a model Lord Chancellor; and Lord Cranworth has manifested some other qualifications, less remarkable indeed, but hardly less essential. In the first place, he possesses a sound and adequate knowledge of both our legal systems; that is, of common law and equity. This is no small or ordinary attainment for an English lawyer. Lord Brougham, when he was intrusted with the Great Seal by Lord Grey, was chiefly known as an eloquent advocate at *Nisi Prius*, and a powerful debater in the House of Commons; and though his marvellous talents and industry enabled him to master the principles of equity, and even to apply them as no other man could with so little experience, yet his judgments could not and do not command the same authority as those of less gifted Chancellors. On the other hand, Lord St. Leonards, though profoundly versed in the mysteries of real property law, had little, if any, practical acquaintance with common law. Lord Cranworth, before he became Lord Chancellor, had occupied a seat for some years on both the judicial benches, and earned the confidence of both branches of the legal profession. It is to this circumstance too, as well as to his unblemished personal character, that he owes his influence in the House of Lords. Since his accession to office, he seems to have experienced no difficulty in presiding over that assembly, which Lord Westbury sometimes found so unruly. The secret of this, no doubt, is that Lord Cranworth has made no enemies; but his opinion on certain questions, such as those affecting criminal justice, is naturally received

with the greater attention, because he is known to be familiar with the duties of a common law judge. The weak point in Lord Cranworth's public life is his want of sympathy with reforms of the law. It is by no means an uncommon failing with those who are plunged early into the details of business, with the prospect of success and wealth, if they will but make the best of the existing system; with the risk, approaching to a certainty, of failure, if they insist on broaching "crotchets" in the hope of amending it. The reason why so few successful lawyers are reformers is, that, until they have succeeded, no one cares to listen to their suggestions; and, after they have succeeded, their own interests are concerned in keeping things as they are; while, had they managed to gain a hearing sooner, they would probably not have succeeded at all. The only two men of our own times who have conspicuously risen superior to these anti-reforming tendencies, or retained energy enough to use the vantage ground of a great position for the sake of initiating organic changes, are Lord Brougham and Lord Westbury; and this is a merit which, in the eyes of posterity, will cover a multitude of sins. It would be ungrateful not to recognize the leading part which Lord Cranworth took in passing the Charitable Trusts Act, whence an important reform in the management of these vast endowments may hereafter be dated. On most other proposals for improving our legal system he has adopted what is called the "safe side," and has done little to realize the vast designs bequeathed to him by Lord Westbury in his valedictory address to the House of Lords. Those designs, involving the formation of a complete digest as the proper basis for a future code, yet remain to be carried out. It would be too much to expect of the new Lord Chancellor, that he should devote himself to the execution of a project which originated with a political opponent; and the honor of accomplishing it will probably be still reserved, as it should be, for a liberal government."

CHIEF JUSTICE LEFROY.

The retirement of the Hon. Thomas Langlois Lefroy, Chief Justice of the Court of

Queen's Bench in Ireland, is one of the noteworthy events of the year 1866. The ex-Chief Justice was born in 1776, and is therefore more than 90 years of age. It is 69 years since he was called to the Irish Bar. He was appointed Baron of the Exchequer in 1841, and promoted to the Chief Justiceship in 1852.

The statements as to his infirmities of late years are very contradictory. Ten years ago, a suggestion that he should retire was moved in Parliament, but was at once put down. The attack was renewed in the early part of the present year, but the old Judge resolved to choose his own time for retiring. To use his own words in a recent address to a Grand Jury, "Such a course," he said, "might have intimidated a weaker man to fly from the post of duty, though in my case it only served to strengthen my determination never to yield to menace what a sense of duty had not led me to concede."

Lord Chelmsford, in the debate in the House on the alleged incompetence of the Chief Justice, stated that from 1852 to that time, there had been only four writs of error from the Court of Queen's Bench, and that for twenty-five years the Chief Justice had not missed a single circuit, or town in any circuit, except in 1847, when he was suffering from low fever, and was obliged to be absent for six weeks.

As soon as Lord Derby came into power, the Chief Justice voluntarily resigned his office.

TRIAL OF FENIAN PRISONERS IN LOWER CANADA.—An extraordinary term of the Court of Queen's Bench on the Crown side, is to be held at Sweet'sburg, in the District of Bedford, for the trial of the Fenian prisoners in Lower Canada, beginning Monday, the 3rd of December.

SECRET INDICTMENTS BY GRAND JURIES.—In noticing, in the last number, the fact that a pamphlet had appeared, bearing the above title, we omitted to mention that answers on the part of the gentlemen referred to by Mr. HIBBARD, also appeared immediately after-

wards. As we stated before, we desired to guard against the expression of any opinion on the merits of the case, especially as we believe legal proceedings are still pending.

PRIVY COUNCIL.—The Judicial Committee of the Privy Council commenced sitting for the despatch of business on the 1st of November. The only Canadian case on the list was that of Gugsy, appellant, and Brown, respondent.

LEGAL APPOINTMENTS IN ENGLAND.—Sir Hugh McCalmont Cairns, Knt., has been appointed a Judge of the Court of Appeal in Chancery, in the room of the Right Honorable Sir James Lewis Knight-Bruce, resigned. A later mail has brought the intelligence of the decease of Lord Justice Knight-Bruce.

John Rolt, Esq., Q.C., has been appointed Her Majesty's Attorney General.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

QUEBEC, Sept. 18.

RENAUD, (plaintiff in the Court below,) Appellant; and PROULX, (defendant in the Court below,) Respondent.

Hypothecary Action—Proof of Ownership.

Held, that the plaintiff in a hypothecary action, must prove that the grantor of the mortgage was proprietor of the immoveable hypothecated at the time when the mortgage was granted.

This appeal was instituted from a judgment rendered on the 6th of June last, in the Superior Court at Quebec, by J. T. Taschereau, J.

The facts of the case were as follows:—At Montreal, on the 11th Sept., 1858, by a notarial deed of obligation, Joseph Paquin, of Grondines, acknowledged to owe to the appellant and C. Fitzpatrick, his partner, the sum of £500, to secure the payment of which sum, with interest, he mortgaged a certain lot of ground, situated in the parish of Grondines. This deed was duly enregistered in the regis-

try office of the county of Portneuf, on the 16th of the same month. On the 27th of January following, (1859) Renaud & Fitzpatrick dissolved partnership, the latter ceding to Renaud all his rights in the partnership concern.

In November, 1865, a balance of \$1589.11 of the above sum remained unpaid, according to the appellant's pretensions, and the defendant, Dame Luce Proulx, being then in possession of the lot hypothecated as above, the appellant instituted an action against her, to recover that amount, the conclusions of his declaration being as follows:—"That the said lot of land be declared to be mortgaged and hypothecated to the payment of the said sum of \$1589.11, in principal, interest, and costs; and that the defendant, as proprietor, possessor, and holder of the said lot of land, be condemned to pay to the plaintiff the said sum, with interest till paid, and costs; unless the said defendant preferred to abandon (*délaïsser en justice*) the said lot of land to be sold by order, &c., which the said defendant should be held to choose between, within fifteen days from service of the judgment to be given in the cause; if not, at the expiration of the said delay, that she should be condemned purely and simply to the payment of the said sum."

To this declaration the defendant replied by a *défense en fait*, and a *défense en droit*, alleging as reasons in support of the latter, 1st, The illegality of the conclusions, which are personal against the defendant, who could only be condemned to abandon unless she preferred to pay; and 2nd, want of signification to Joseph Paquin, the personal debtor, of the transfer of the 27th January, 1859, by which Fitzpatrick ceded to Renaud his part in the amount of the obligation of the 11th Sept., 1858, the foundation of the action, and the want of any acceptance of the said transfer by Joseph Paquin.

Upon these pleadings issue was joined, and the Superior Court, on the 6th June last, rendered judgment, dismissing the action, and maintaining defendant's pleas.

This judgment was confirmed with costs by the Court of Appeals, the ground assigned being that the plaintiff had failed to prove that Joseph Paquin, at the date of the obli-

tion, was proprietor of the land, on which he, the plaintiff, claimed a hypothecary right.

Taschereau & Blanchet, for the appellant.

Montambault & Taschereau, for the respondent.

COURT OF REVIEW.

MONTREAL, May 30.

DORAN v. DUGGAN.

Practice—Ejectment—Lessors and Lessees Act.

Held, that an action of ejectment cannot be brought under the Act, C. S. L. C. cap. 40, respecting Lessors and Lessees, unless there be a lease, or a holding by permission of the proprietor, without lease, i. e. unless the relation of landlord and tenant exists between the parties.

2. That where the plaintiff alleges that there is no lease or holding by his permission, the defect cannot be cured or supplied by the allegation of the defendant, in his plea to the merits, that there was a lease.

This was an action of ejectment under the *Lessors and Lessees Act*, brought by Julia Doran, widow of Patrick White, in her quality of tutrix to the children, issue of the marriage. The writ was issued on the 7th March, 1866, and returned on the 9th of March.

The declaration set out that on or about the 21st of February last, the defendant "without any lease verbal or written, entered upon and took possession" of a shop and dwelling-house belonging to the estate of the late Patrick White, "and that he still continues forcibly and against the wish and desire of the plaintiff to hold and occupy the said premises, and refuses to leave the same and deliver the same to the plaintiff, and refuses to allow plaintiff or her tenants to enter or occupy the said premises." The declaration went on to state that the plaintiff had let the same premises to one Ronald Macdonald, but was unable to give him possession, "through the forcible and illegal occupation of the defendant, to plaintiff's very great and serious loss and damage." Conclusions, that *saisie-gagerie* issue, and also for ejectment of the defendant.

The defendant first put in a preliminary plea, or *exception déclinatoire*, alleging that he could not be bound to answer the action, because the plaintiff had no right of action under the act respecting lessors and lessees,

cap. 40, C. S. L. C., under which act the action was instituted.

The defendant, the same day, on the demand of the plaintiff, pleaded to the merits, alleging that he was in lawful possession of the shop and premises in question, under a verbal lease of the same, and delivery of the key to him as tenant, at the rate of \$14 per month, for the period of one year from 1st May, 1866, and rent free for the broken period from the 15th February, 1866, when he lawfully entered into possession.

The issue being joined, the parties proceeded to evidence, and the *enquête* having been closed, and the parties heard on the merits,—on the 23rd of March, *Smith, J.*, rendered judgment in favour of the plaintiff, “considering that this action falls within the Lessor and Lessee Act, as it is a question of lease or no lease, the defects of the declaration, if any defects exist, being cured by the pleas of the defendant, and that by the issue raised it is a question of lease, and considering that the plaintiff hath proved the material allegations of her declaration, &c.”

The defendant then inscribed the case for review, and the following judgment was rendered, May 30.

SMITH, J., dissenting. It appears that the defendant, wanting to lease a certain house, went to the proprietor for permission to go in and view the premises. After seeing the place he said he would not pay more than \$14 a month, the rent asked being \$15. Sometime after, under pretence of wishing to see the premises, he got into the house and refused to leave, and the present action was brought to eject him from the premises. The action was taken out under the Lessors' and Lessees' Act, but there is not much said about a lease in the declaration. The defendant pleaded by declinatory exception that it was an ordinary possessory action, which could not be brought under the above mentioned act. But in his plea to the merits, the defendant set up that there was a lease. Under the circumstances I considered that the defect in the declaration was cured by the mention made of a lease in the pleas, and I admitted the parties to evidence in the Court below. The question is, whether the pleas can come to the aid of the

declaration. I always understood that they can. Another circumstance to be taken into consideration is, that the evidence of the parties plainly establishes the facts between them, and the only defect in the declaration could be remedied by the insertion of these words, that the defendant under a lease entered into possession.

BADLEY, J. The declaration sets out a forcible entry and detainer, but it concludes very singularly for a *saisie-gagerie*. The facts are, that the defendant, under pretence of looking at the premises, obtained the key, and then persisted in remaining in occupation. As the case stands it is evidently one of forcible entry and detainer, and how can such an action be brought under the Lessors' and Lessees' Act? The judgment must be reversed, but under the circumstances of the case, each party is condemned to pay his own costs.

MONK, J. It is not without some difficulty that I have been able to concur in the judgment. The declaration sets out in express terms that the defendant, without any lease verbal or written, and by violence, took possession of the plaintiff's property, and it contains nothing to show that the case has any connection with the Lessors' and Lessees' Act. It is an elementary principle in all cases under the Lessors' and Lessees' Act, that the relation of landlord and tenant must necessarily exist. The present case does not come under any of the provisions of that act, the possession being one of violence. When this extraordinary declaration was filed, the defendant pleaded a declinatory exception, stating that the action was in the nature of a possessory action, and could not be brought under the act. Then the defendant put in his plea to the merits, setting up that there was a lease, and this would seem to bring the case under the provisions of the statute; but the plaintiff, in his answer, persists in stating that there was no lease, or holding with the permission of the proprietor. The parties have gone to evidence, but there is not a tittle of evidence to show that the relation of landlord and tenant existed between the parties. This, then, was a case in which recourse should have been had to the criminal law or the common law.

The judgment was entered up substantially

as follows:—"The Court, &c., considering that the said action of the plaintiff hath been instituted and prosecuted under the provisions of the Lessors' and Lessees' Act, but does not rest upon any lease or agreement, conventional or legal, between the plaintiff and the defendant; considering that the said plaintiff cannot, for the causes aforesaid, maintain her said action; and that, therefore, in the judgment rendered by the Circuit Court, on the 28th of March, 1866, there is error, doth reverse and set aside the said judgment, and proceeding to render such judgment as should have been rendered by the Circuit Court, doth dismiss the action, and doth condemn each party to pay his own costs, as well in the said Circuit Court as of this Court.

Judgment revised, SMITH, J., dissenting.

Clarke, for the plaintiff.

Day & Day, for the defendant.

SUPERIOR COURT.

MONTREAL, Oct. 27.

IN RE THURBER.

Insolvent—Opposition to Discharge.

An insolvent, within a few months previous to the time he stopped payment, made large purchases from several parties, and at the same time was borrowing at from a half to one per cent. per week. He had made no balance sheet for two years previous to his suspension.

Held, that the Court could not refuse to confirm his discharge on these grounds, in the absence of proof that he made the purchases knowing that he was insolvent, and in contemplation of insolvency.

The insolvent, Alexander Thurber, having obtained the assent of the required majority of his creditors to a deed of composition and discharge, under the Insolvent Act of 1864, petitioned the Court in the usual form for confirmation of his discharge. This petition was contested by a number of creditors who had refused to become parties to the deed of composition.

The following were the principal grounds assigned by the contesting creditors:—That the insolvent was a bankrupt to his own knowledge in 1863, and was so continuously up to the time he declared himself to be so, on the 19th of May, 1866. That not only was he insolvent to his own knowledge, and actually a bankrupt during all the period above

mentioned, but his affairs became gradually worse from the date of his balance sheet in 1863, to the time of his actual stoppage on the 19th of May last; so much so, that, in addition to his ordinary discounts at the banks, he was obliged to borrow money during the whole of the above mentioned period at from 14 to 15 per cent. discount; and from July, 1864, to the time of his stoppage, at the rate of a half to one per cent. per week. That the insolvent purposely concealed the actual state of his affairs from his creditors, and even purposely abstained from making a balance sheet at any time since 1863. That all the purchases which the insolvent made from his creditors were so made during the six or seven months immediately preceding the 19th of May last, and some of them within a few weeks of that date. That when the insolvent purchased from the contesting creditors the goods for the price of which they are creditors in this matter, he knew himself to be unable to meet his engagements, and concealed the fact from his creditors with the intent to defraud them. That the insolvent, on or about the 18th of May last, fraudulently disposed of a large quantity of teas, forming part of his estate, to A. W. Hood, for the most part at cost price, and fraudulently employed the proceeds, so that no part of such proceeds have in any way formed part of the assets for distribution in this matter. That on or about the 18th of May last, the insolvent fraudulently preferred Messrs. Prentice, Moat & Co. and P. D. Browne, who were then creditors of the insolvent. That the insolvent, by certain entries made in his books within a few weeks of his insolvency, fraudulently represented his own wife to be a creditor of his estate for the sum of \$3000, whereas it is established in his examination under oath that she never was a creditor of the insolvent in any sum of money whatever. That in February last, the insolvent fraudulently procured the destruction of a promissory note, signed by Thomas Davidson, in favour of, and endorsed by the insolvent to Henry Thomas, in order to induce Davidson not to oppose the deed of composition and discharge filed in this matter, and that the effect was to make Davidson withdraw all opposition to the confirmation of the deed.

MONK, J. This is an application of an insolvent, under the Insolvent Act of 1864, for a confirmation of his discharge. The insolvent made an assignment, and, subsequently, the required proportion of his creditors signed a deed of composition, under which he was to be discharged on paying 3s. 9d. in the £., for the payment of which he gave security. He now applies to the Court to confirm the discharge, and the application is opposed by Messrs. Law, Young & Co., Holland, John Redpath & Son, and other creditors. There are several grounds of opposition. In the first place, it is alleged that he made several purchases in contemplation of bankruptcy. Thurber had been doing business here for several years back. He had evidently no knowledge of book-keeping. On the 30th Dec., 1863, he took stock. At this time he considered himself perfectly solvent. But the balance sheet shows that his solvency depended upon a great many outstanding debts, some dating four or five years back, which could not be considered of much value. He had little or no capital, but nevertheless, his transactions were very large. During 1864 and 1865, he made purchases from Messrs. Law, Young & Co., and other parties, and the first pretension is that he made these purchases knowing that he was insolvent, and in fraudulent contemplation of bankruptcy. Further, that in 1865, when on the very verge of bankruptcy, and when the clouds were thickening around him, he credited his wife with \$3000, with interest. It must be conceded that this had a suspicious look, as well as the circumstance that he made no balance sheet in 1864. But though these circumstances, combined with the fact of his large purchases, and the small amount of his capital, seem to justify the pretensions of the opposing creditors, yet I do not find sufficient evidence to justify me in thinking that at this time Thurber knew himself to be insolvent. During the time he was making these purchases he was borrowing money at heavy interest from brokers, paying from a half to one per cent. per week, and obtaining large discounts at the banks. The evidence respecting these transactions gives a curious insight into the way business is done in Montreal. He

thought he would be able to pull through. He seemed to be a man of great resolution, who would struggle to the last. As for the \$3000 credited to his wife, it appears that this was done solely at the suggestion of Mr. Montgomery, his book-keeper. The money had been advanced to him by his father-in-law, by his own note for \$2000, and \$1000 in cash; and it was understood at the time this advance was made that it was to be placed to the credit of his wife. I am firmly convinced, from an examination of the evidence, that Thurber believed he would be able to pull through. I cannot believe that he was aware of his insolvency. Further, it must be taken into consideration that two-thirds of his creditors have consented to his discharge. This is a fact which should have considerable weight, that a number of shrewd business men have signed his discharge, and are of opinion that he should be discharged. There is another fact. A note of his for upwards of \$3000 was coming due on the 15th of May. Three days previously, he went to the bank, and offered \$2000. The bank said they would not take \$2000, but that they would hold the note over for a few days. He struggled to the last to maintain his credit. This does not look like the conduct of a man about to make a fraudulent bankruptcy. In order to maintain the pretensions of the opposing creditors, I would have to go to the extent of saying not only that he was insolvent, but that he was aware that he was insolvent, and that he made the purchases in contemplation of insolvency. Now, I cannot go to that extent. The next ground urged was that there have been fraudulent preferences in favor of various parties; but I see nothing in the transactions complained of, that amounts to fraudulent preference. It is also alleged that an illegal consideration was given to induce one of the creditors to sign the deed of composition. On examination, however, it appears that the estate was not injured by this in the slightest degree, and I do not think the objection well founded. I am of opinion that the opposition to the discharge must be dismissed, and the discharge confirmed.

Abbott & Carter, for the petitioner.

Bethune, Q. C., for the contesting creditors.

Oct. 31.

LOVELL v. CAMPBELL ET AL.

Principal and Agent—Liability of Agent—Solidarity.

Four persons, assuming to act as representatives of the Seigniors of Lower Canada, ordered certain work to be executed for them. The names of their principals, individually, were unknown, and the agents did not act under a power of attorney.

Held, that the agents were personally liable, inasmuch as they did not disclose the names of their principals, by producing and acting under a power of attorney; but that they were not liable *in solido*.

The facts of this case are sufficiently set forth in the judge's remarks.

MONK, J. It is unnecessary to say that this case has given me a good deal of trouble, but at length, after an examination of all the pleadings and evidence, I have arrived at a final decision. It appears that the Seigniors of Lower Canada, in 1854 or 1855, becoming very much alarmed about their rights, met in Montreal, and agreed to take defensive measures against the Legislature of the country, and afterwards against the probable decision of what are known in history as the Seigniorial Courts. For the purpose of concentrating their efforts, they selected four gentlemen of extraordinary ability, Messrs. Campbell, Wurtele, Papineau and Pangman, who called themselves, and were generally known as the Seigniorial Committee. These gentlemen acted for all the Seigniors of Lower Canada; they had a representative capacity, but that capacity was not made known by any power of attorney. The precise nature of their powers, however, is pretty clearly defined by the circulars printed by Mr. Lovell, and distributed by the committee. One of their powers seems to have been the retaining of counsel. Messrs. Dunkin, Cherrier, and Mackay, gentlemen of great ability, were retained by the committee. The factums prepared by counsel were printed, and for these factums, Mr. Lovell makes a charge in his account against the Seigniorial Committee. The account also contains a variety of other items. It is admitted on the part of the defendants that the work was done, and that the charges are fair and reasonable. Two small sums have been paid on account, but a

balance of \$1100 remains due, and it is for this balance that the plaintiff brings the present action against the four gentlemen composing the Seigniorial Committee. The defendants have pleaded separately. Mr. Campbell says the Seigniorial Committee are not responsible; Mr. Wurtele alleges that he made certain payments on account. But Mr. Papineau has put in a special plea, saying that he had no interest in the matter; that he was not a Seignior, and merely acted for his father. But it appears that he did not take the quality of an attorney of any one; he acted like the others as a Seigniorial representative.

Upon the issues thus joined, the case comes up for adjudication. The evidence adduced is voluminous, and we have to consider the position in which these gentlemen stood with respect to the plaintiff. As I have already observed, there is no difficulty about the value of the work; the only question is whether the defendants are liable; or whether the plaintiff must bring his action against the Seigniors of Lower Canada. Now, I find in the circulars printed by order of the Seigniorial Committee, that these gentlemen speak of their responsibility, and they seem to say that their authority extended to the retaining of counsel, and expenses connected therewith. In fact, the gentlemen composing the Committee acted imprudently; they went on getting circulars and factums printed, and retaining counsel, without taking the precaution of getting their constituents to advance the necessary funds. Mr. Wurtele was appointed Secretary; and in the circular letters issued by him, frequent appeals are made to the Seigniors to contribute, but they do not seem to have paid much attention to them. [His Honour read two of these letters.] While the work was being executed, the members of the Committee were in constant communication with the plaintiff. Mr. Wurtele was frequently at his office, and authorized him to incur the expense. It appears from the evidence that when Messrs. Dunkin, Mackay and Cherrier were ready with their factums, and desired to have them printed, the plaintiff said he would like to have some authority to do the work, as counsel were not liable. Accordingly, on the 30th December, 1855, the following

order was given to him:—"Please print the factums of Messrs. Dunkin, Cherrier and Mackay, and charge the same to the Seigniorial Committee." This was signed by the four members of the Committee, Mr. Wurtele signing as Secretary. Here was a precise direction from the Seigniorial Committee to the plaintiff to print these factums, which make up the bulk of the account, Mr. Dunkin's being \$490, Mr. Cherrier's \$262, and Mr. Mackay's \$44.80, and the charges are undoubtedly fair and reasonable. With respect to the circulars, there can be no doubt that they were also printed at the request of the Seigniorial Committee. Now, there is a principle of law, that if an agent chooses to conceal the name of his principal, and does the thing in his own name, he is responsible; and there is another principle that if a man assumes to act as the attorney of a party, it is not sufficient for him to allege that he was acting as such attorney, but he is bound to show his authority to act, otherwise he is personally liable. The worst of the present case is that neither the one nor the other of these principles is exactly applicable. But, as a matter of fact, the Committee did not disclose the names of their principals. The plaintiff is not supposed to know who all the Seigniors of Lower Canada are, nor in point of fact does any one know. If, on the other hand, the Committee assumed to act as representatives, and were not authorized to act as such, they are personally liable. If I were to dismiss this action, I would have to say that they were not liable because they were acting under a power of attorney. Now, there is no such power of attorney, and I cannot do otherwise than hold them liable. But I cannot condemn them jointly and severally; they can only be condemned jointly. *Solidarité* is never to be presumed.

Now we have to consider whether Mr. Papineau was liable. Mr. Papineau pretends that he had no interest in the matter; that he was only acting for his father. But Mr. Papineau not only signed as Seigniorial Commissioner, but he signed without any qualification. He represented himself to the plaintiff in the quality of Seignior. He never took his quality as representative of his father. On one occasion, Mr. Cherrier wanted a number of copies of his

factum. The plaintiff said he could not deliver them without an order from the Committee, and Mr. Papineau signed the order for 200 copies as one of the Seigniorial Committee, without any qualification. So far as the plaintiff is concerned, Mr. Papineau has, therefore, put himself precisely in the same position as the others. It is a hard case for the defendants to have to pay this money now, but they ought to have taken precaution and secured themselves. The plaintiff exercised all the care that could be expected of him, and it was only reasonable for him to rely upon the Committee for payment. The defendants must be condemned jointly to pay the balance of the account, less five items, for which they cannot be held responsible.

Torrance & Morris, for the plaintiff.

R. Roy, Q. C., P. R. Lafrenaye, for the defendants.

April 30.

IRELAND v. GREGORY, AND MILLS, T. S.

Saisie-Arrêt.

Held, that the Court cannot, in a contestation upon a *saisie-arrêt*, look into accounts between the garnishee and a party not in the record, in order to determine what may be due from the garnishee to the defendant.

SMITH, J. After obtaining judgment in this case, the plaintiff took out a *saisie-arrêt* in the hands of Mr. Mills, who has made a declaration stating that he owes the defendant nothing, and has no prospect of owing him anything. It is on this declaration that the contestation arises. The plaintiff has entered into a variety of transactions between the garnishee and other people; but before the Court can look into these transactions there is a preliminary point to be considered: Can the Court, under a *saisie-arrêt*, look into transactions and disputed accounts between the garnishee and a party not in the record, in order to ascertain what may be due to the defendant? The object of the *saisie-arrêt* is to touch what may be due in money, not to ascertain what balance may remain after other transactions have been settled. The proper mode of proceeding is by a direct action to account against Mr. Mills. The Court cannot look into a transaction between Mr. Mills and a party not in the record,

under a *saisie-arrière*. The plaintiff must resort to a direct action. Under these circumstances, the Court cannot proceed further with the case, the contestation by the plaintiff of the declaration of the garnishee being dismissed on this ground.

Abbott, Q. C., for the garnishee.

Morris, for the plaintiff contesting.

May 30.

TRINITY HOUSE v. BROWN.

Negligence—Collision.

The persons in charge of the plaintiffs' steamer, supposing the defendant's vessel to be at anchor, tried to pass inside between it and the shore, and in so doing the two vessels came into collision, and the plaintiffs' vessel sustained damage.

Held, that the collision being caused by the plaintiffs' mistake, they could not recover.

This was an action brought by the Trinity House of Montreal, against Mr. John Brown, contractor, and proprietor of the steamer *John Brown*, to recover the sum of \$450 damages occasioned to that vessel by collision with the *Richelieu*, a steamer belonging to the Trinity House. The accident occurred on Sunday, the 23d of July, 1865, on the St. Lawrence, near Lavaltrie, and the plaintiffs alleged that it was caused by the want of skill, care and attention of the pilot of the *John Brown*.

SMITH, J. This is an action brought to recover damages occasioned by a collision of the defendant's steamer *John Brown* with the *Richelieu*, belonging to the plaintiffs. The facts are very simple. It appears that one night the *Richelieu* was proceeding to Montreal, when the persons on board spied a light at some distance, and a discussion took place as to what the light was. The *Richelieu* had her lights burning and her pilot on board, and the first question that arises is, Were the lights required by law on board the *John Brown*? On this point the evidence is contradictory. It is stated that the lights were there, but the vessel being low in the water they might not have been perceived on board the *Richelieu*. The collision took place in this way:—The people on board the *Richelieu*, supposing the *John Brown* to be a vessel at anchor, attempted to pass inside, and turned the helm wrong.

If the *John Brown* had really been at anchor, the *Richelieu* might have passed inside, but not otherwise. The collision occurred through this mistake, and not through any culpable act, but the law makes no distinction as to damages. The plaintiffs were in error in trying to pass inside. If they had kept on the outside there would have been no collision. The action must therefore be dismissed with costs.

Bethune, Q. C., for the plaintiffs.

A. & W. Robertson, for the defendants.

CIRCUIT COURT.

Oct. 27.

TORRANCE v. RICHELIEU NAVIGATION COMPANY.

Common Carriers—Steamboat Company—Loss of Wearing Apparel.

A passenger in a steamboat belonging to the defendants placed his overcoat on a sofa in the eating saloon, before going to supper. He had been told by a waiter that it would be safe if left on a table close by the sofa. The overcoat was stolen while he was at supper.

Held, that the liability of common carriers does not extend to articles of wearing apparel such as an overcoat, which may be thrown off and laid aside, unless specially deposited in the charge of the carriers' servants; and that the defendants in this case were not liable, because no such deposit was made.

MONK, J. This is a case which, though involving a very small amount of money, yet presents a question of considerable importance, and I feel some doubt whether the decision at which I have arrived is right. It appears that in November, 1863, the plaintiff, Mr. Torrance, with two other gentlemen, embarked at Quebec, on the *Europa*, one of the Company's steamers, for the purpose of proceeding to Three Rivers. They did not get state rooms. About twenty minutes after the boat started the bell rang for tea. Mr. Torrance proceeded to the eating saloon, where he threw off his overcoat, and asked one of the waiters if it would be safe. The waiter replied that it would be safe on the table. Mr. Torrance, however, left the coat lying on the sofa while taking tea. On returning to the sofa after supper, he found that the coat was gone. An action has been brought for the value of it, and the question is, are the Company liable? The plain-

tiff's pretension is that they are liable as common carriers. The plea of the Company is that they were not bound to look after the plaintiff's coat, or hat, or overshoes, but only after his baggage or valuables confided to their keeping. They admit that they were bound to carry himself and his baggage safely, but say that they are not liable for articles of wearing apparel not specially placed in their custody. They allege that there were two state rooms for keeping clothing in. They say that if the plaintiff had consigned his coat to the care of a servant, they would have been liable. It was even admitted at the argument, that if Mr. Torrance had left the overcoat on the table where the waiter told him it would be safe, they would have been liable. But the coat was not left on the table, there was no special delivery to the waiter, and the case presents itself in this form :—The plaintiff embarked on the boat; he did not place his overcoat specially under the charge of the waiter; he did not leave it in the place where the waiter told him it would be safe; are the Company liable?

A good deal of stress has been laid on the Roman law, and also on the general law respecting carriers. No doubt the obligations of common carriers extend to the traveller himself, and to any precious articles he may give into their care; but I doubt whether they go to the extent of making the Company liable for an article like an overcoat. It appears to me that a distinction must be made between an article of wearing apparel which may be thrown off, like an overcoat, and precious articles confided to the care of a carrier. A case has been cited which occurred in Upper Canada. (*Gamble v. Great Western Railway Co.*, p. 236, Vol. 1, Upper Canada Law Journal, New Series.) A gentleman got on board a train with a carpet bag, which he hung up in the car, in disregard of the rule of the Company, requiring such articles to be checked. On arriving at a station, he placed the bag on his seat, as though to intimate that the seat belonged to him, and went to get his breakfast. During his absence, some fellow loafing about the car walked off with the bag. The traveller brought an action against the Company, and, notwithstanding the absence of any proof

that he had conformed to the rules of the Company by checking, or attempting to check, the bag, or had made a special deposit of it in any one's care, the Court, composed of Chief Justice Draper, Justices Haggerty and Morrison, condemned the Company to pay, Morrison, J., dissenting. This decision seems to me to be carrying the liability of common carriers to a preposterous extent. But in any case that decision does not apply here; for in that case it was luggage that was lost and not an overcoat or walking stick. The Court seems to have laid stress upon the fact that it was luggage. I do not think that either this or any other case cited is exactly in point. A number of French decisions have been cited, one of which is as follows:—A man arrives at a hotel. The hotel keeper says, I am crowded, I can only accommodate you with a room shared by another traveller. The man replies that he is not particular, and he is conducted to his room. At night he places his watch with a considerable sum of money under his pillow, and falls asleep. In the morning he finds his fellow-traveller gone, and his watch and money also gone. He brought an action against the hotel-keeper, and, strange to say, the Court condemned the latter to pay the amount. The only explanation of this decision that can be supposed is, that there was no evidence that it was the traveller's bed-fellow that carried off the watch. However, it certainly was going very far to hold the hotel-keeper liable, when there was no intimation to him, no special deposit. But I find nothing in any of these decisions that is exactly to the point. The text of the Roman law might perhaps hold the Company liable. But having no authority exactly in point, by which I am bound, and being left to the consideration of the case apart from precedents, I am inclined to say that the Company are not liable; and for these reasons:—1st. Because the article was not luggage, and did not come under the heading of luggage or merchandize. 2nd. The plaintiff did not take the precaution to put it in the special place set apart for clothing. 3rd. The servant told him it would be safe on the table, and he did not leave it on the table. It is true that when the plaintiff discovered his loss the captain told him it would be made

all right, but when I come to weigh the force of a slang expression like this, I cannot lay much stress upon it. Upon the whole, then, the action of the plaintiff must be dismissed.

Torrance & Morris, for the plaintiff.

Cartier, Pominville & Bétournay, for the defendants.

May 30.

TEES v. M'CULLOCH.

Deed of Composition—Novation.

Held, that an agreement in the following terms effects a novation of the original debt:—"We, the undersigned creditors, hereby agree to take 2s. 6d. in the £. for our respective claims set forth in the annexed statement, and on payment thereof within six weeks from date, we hereby undertake to grant him a discharge in full."

This was an action for a balance due on an account for goods sold and delivered. The defendant, in the first place, denied that he owed the plaintiff anything; but proceeded to state that in any case the plaintiff could not recover more than 2s. 6d. in the £. on his claim, inasmuch as about two years previously, the plaintiff, among other creditors of the defendant, had signed a deed of composition *sous seing privé*, agreeing to accept 2s. 6d. in the £. The agreement produced was in the following terms:—"We, the undersigned creditors, hereby agree to take 2s. 6d. in the £. for our respective claims set forth in the annexed statement, and on payment thereof *within six weeks from date*, we hereby undertake to grant him a discharge in full." The plaintiff admitted his signature to the agreement; and the defendant, on his part, admitted that the six weeks mentioned in the agreement had long previously expired, and that he had never paid or offered to pay any part of the debt. The case was submitted on the admissions, without other evidence, the sole question being whether the agreement to take 2s. 6d. in the £. was, on the face of it, conditioned upon payment being made within six weeks, or whether there was novation of the original debt.

BADGLEY, J. The plaintiff can only have judgment for the amount as settled by the composition agreement.

Kirby, for the plaintiff.

M'Coy, for the defendant.

RECENT ENGLISH DECISIONS.

QUEEN'S BENCH.

Master and Servant—Negligence of fellow-servant—Common employment.—The rule, which exempts a master from liability to a servant, for injury caused by the negligence of a fellow-servant, applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one, is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages. Thus, whenever an employment in the service of a railway company is such, as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such employment, and within the rule. The plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding, at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured:—*Held*, on the above principle, that the company were not liable. *Morgan v. The Vale of Neath Railway Co.*, 1 Q. B. 149. [Compare *Fuller v. Grand Trunk Co.*, 1 L. C. L. J. p. 68, in which case the general rule enunciated above seems to have been stated for the first time in our courts.]

Justice of the Peace—Disqualifying Interest.—Though any pecuniary interest, however small, in the subject-matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties, does not *ipso facto* avoid the justice's decision; in order to have that effect the bias must be shown at least to be real. *Regina v. Rand*, Q. B. 230.

Railway Company—Level Crossing.

The defendants' line of railway was crossed

by a public carriage road diagonally on a level, and there was also at the same spot crossing the railway nearly at right angles a private way leading to C.'s store-yard. There was a gate on C.'s side of the railway opening into his yard, which was a private gate under C.'s control, but nearly immediately opposite, on the other side of the railway, there was one gate across both the private way and the public carriage road, and this gate was under the control of the defendants, there being a gatekeeper stationed there by them, pursuant to section 47 of the Railways Clauses Consolidation Act. Any one going with a carriage, &c., to C.'s yard passed through this gate across the railway, and in at the private gate opposite, and *vice versa* on leaving the yard. The plaintiff's carman, with his cart and horses, having unloaded in C.'s yard one evening after dark, was about to leave, and having opened C.'s gate, the gate opposite being nearly closed, hailed the defendants' gatekeeper on the opposite side of the railway, to know if the line was clear, and he answered, "yes, come on." The cart and horses accordingly proceeded, and were run into by a train:—*Held*, that though section 47 in terms imposed the duty on a railway company of merely keeping "the gates closed across the public carriage road, except when carriages, &c., shall have to cross the railway," yet the duty was implied of using proper caution in opening them; that, whatever might have been the consequence, had the way which the plaintiff's carman was using been simply the private way, as he could not get across the railway without passing through the public gate, it was the gatekeeper's duty to open or refuse to open it for him; that what the gate-keeper said was equivalent to opening the gate, and he, therefore, was guilty of negligence in connection with his duty, for which the defendants were liable. *Lunt v. London & North Western Railway Co.*, Law Rep. 1 Q. B. 277.

Criminal Law—Felony—Discharge of Jury, effect of—Second Trial—Writ of Error.

The record of a conviction for felony showed, that on the trial of the indictment, the jury being unable to agree, the judge discharged them; that the prisoner was given in charge of

another jury at the next assizes, and a verdict of guilty returned, and judgment and sentence passed. On writ of error:—*Held*, that the judge had a discretion to discharge the jury, which a Court of Error could not review; that the discharge of the first jury without a verdict was not equivalent to an acquittal: that a second jury process might issue; and that there was no error on the record. *Winsor v. The Queen*, Law Rep. 1 Q. B. 289.

We have already noticed this case, vol. 1, L. C. L. J., p. 103, but as it is a case of great importance, it may not be uninteresting to insert here an abridgment of the report in the April number of the Law Reports.

On Friday, the 17th of March, 1865, Charlotte Winsor and Mary Ann Harris, indicted for the murder of one Harris, were arraigned and pleaded not guilty. The trial began on the Friday, and the jury retired about seven o'clock on the Saturday evening. At five minutes before midnight, the jury, not being able to agree, were discharged. At the next session, a motion was made on the part of the Crown, that Charlotte Winsor be tried separately, and that Mary Ann Harris should be admitted to give evidence on her trial. This was allowed by the Court, and Charlotte Winsor was convicted. A writ of error was then issued, and it was contended, before the Court of Queen's Bench, on behalf of the plaintiff in error, 1st, that the discharge of the jury was wrongful; that the judge had power to discharge only in cases of evident necessity, as the death or illness of a juror; and in cases where the discharge has been for the benefit of the prisoner, and at his instance. 2nd. That the verdict could have been taken on the Sunday. 3rd. That though the judge may discharge a jury in a case of misdemeanour, if they do not agree, he has no power to discharge them in a case of felony. 4th. If the judge had a discretion, the Court of Error can review his mode of exercising it. 5th. The second trial was illegal, because the prisoner could not be put upon her trial a second time. Lastly, The evidence of Harris was improperly admitted: before it could have been received, either a verdict of not guilty ought to have been taken, or she should have pleaded guilty, and sentence also should have been passed.

COCKBURN, C.J., in rendering judgment, observed:—"I have no hesitation in expressing my own opinion, that, after the jury have retired to consider their verdict, and have remained in deliberation a full and sufficient time, if they are not agreed, and there is no reasonable expectation of their coming to a unanimous decision, it is within the province of a judge presiding on a criminal trial, in the exercise of his discretion, to discharge the jury."—"Since Blackstone's time, the case has several times arisen in which the illness of a juror, or the illness of the prisoner, has been held a sufficient ground for the discharge of the jury; and nobody has questioned that in these cases a second trial might be had, and the accused put a second time on his defence. We find, in the case of *Rex v. Cobbett*, that most excellent and learned judge, Lord Tenterden, discharged a jury of his own act and in the exercise of his discretion, after they had been in deliberation fifteen hours; and other instances have been cited where judges have acted in a similar manner: It appears to me that, if the true principle on which justice ought to be administered is regarded, it is essential in trial by jury not to abridge the judge's discretion, but to leave it unfettered. Our ancestors insisted on unanimity as the very essence of the verdict, but they were unscrupulous as to the means by which they obtained it; whether the minority gave way to the majority, or the reverse, to them appeared to have been a matter of indifference. It was a struggle between the strong and the weak, the able-bodied and the infirm, which could best sustain hunger, thirst, and the fatigue incidental to their confinement. It was said by the prisoner's counsel that it was competent to judges, and the duty of judges, to carry with them in carts a jury, who could not agree, to the confines of the county where the trial was held, or even beyond the county. I doubt whether there is authority for this assertion. The dicta that are to be found in the Book of Assize have been copied servilely by text writers, and that has given rise to this opinion. I question very much whether such a practice ever existed; I am sure it has not in modern times. But suppose it to have been so, we, now-a-days, look upon the principles on which

juries are to act, I hope, in a different light. We do not desire that the unanimity of a jury should be the result of anything but the unanimity of conviction. It is true that a single jurymen, or two or three constituting a small minority, may, if their own convictions are not strong and deeply rooted, think themselves justified in giving way to the majority. It is very true, if jurymen have only doubts or weak convictions, they may yield to the stronger and more determined view of their fellows; but I hold it to be of the essence of a jurymen's duty, if he has a firm and deeply rooted conviction, either in the affirmative or the negative of the issue he has to try, not to give up that conviction, although the majority may be against him, from any desire to purchase his freedom from confinement or constraint, or the various other inconveniences to which jurors are subject. When, therefore, a reasonable time has elapsed, and the judge is perfectly convinced that the unanimity of the jury can only be obtained through the sacrifice of honest conscientious convictions, why is he to subject them to torture, to all the misery of men shut up without food, drink, or fire, so that the minority, or possibly the majority, may give way, and purchase ease to themselves by a sacrifice of their consciences? I am of opinion that so far from the practice of thus discharging a jury being a mischievous one, it is one essential to the upholding of the pure, conscientious, and honest discharge of the duties of a jurymen."—"In this case it appeared that the jury had been five hours only in deliberation, but it was within a few minutes of midnight of the Saturday; and, further, on the Monday the judges were bound to be at Bodmin in discharge of their duties, that being the commission day of the assizes. The judge was therefore placed in a position of very great difficulty, in consequence of the Sunday intervening. In the first place, the question arose, whether the judge should not adjourn till the Sunday, and take the verdict of the jury on the Sunday. It is laid down in distinct terms by high authority, that of Lord Coke and Comyns, that Sunday is not a juridical day; and it is idle, I think, to contend that the taking of a verdict, the delivering of a verdict on the part of the

jury, and the receiving it on the part of the judge, and the recording it, which is also, though the act of the officer, the act of the Court, were not judicial acts; and I entertain the greatest doubts whether the verdict would not have been invalid, if it had been delivered, received, and recorded on the Sunday. Then, it is said, that the judge might have adjourned till the Monday, and have kept the jury confined on the Sunday, so as to have received the verdict on the Monday. That, no doubt, could have been done with perfect judicial regularity. But this startling difficulty would arise, that since it would be impossible, because absolutely inhuman, to keep the jury without meat or drink during the whole of the Sunday until the Monday, they having been shut up on the Saturday night, the only alternative would have been to have allowed the jury refreshment in the interval. There is no authority for so doing; I believe the authorities rather point the other way. After once the jury have retired to consider their verdict, there is no authority that I am aware of for saying,—or at least no satisfactory authority, for I do not think that what is said in Doctor and Student goes that length, or, if it did, ought to be considered as sufficient to militate against the whole course of practice,—that a jury can have refreshment during the period of their deliberation. The oath that is administered to the bailiff has a strong tendency to support this view; he is sworn to keep them without meat, drink, or fire, (candle light excepted); and then it goes on, ‘nor to speak with them yourself, nor to allow any one else to speak with them without the leave of the Court.’ The exception as to the leave of the Court relates to persons speaking to them, not to allowing them meat, drink, or fire; and I question very much whether, inasmuch as this system of coercion has been handed down to us from our ancestors, the judge could take upon himself to alter the practice without the intervention of the legislature; the sooner that occurs the better for the administration of justice.”—“It was pressed on us also that the evidence of the accomplice, Harris, had been improperly received. That is a matter which we cannot take into account. It was alleged that the accomplice came forward to give evidence

under peculiar circumstances. The plaintiff in error and Harris were both joined in one indictment, and on the first occasion were tried together. On the second, it was proposed, on the part of the prosecution, to sever the trial, with the view to the one prisoner becoming a witness against the other. No doubt that state of things, which the resolution of the judges, as reported to have been made in Lord Holt's time, was intended to prevent, occurred. It did place the prisoner under this disadvantage; whereas, upon the first trial that most important evidence could not be given against her, it was given against her upon the second, so that the discharge of the jury was productive to her of that disadvantage. I equally feel the force of the objection, that the fellow prisoner was allowed to give evidence, without having been first acquitted, or convicted and sentenced. I think it much to be lamented. In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of insuring the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty as to him; or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence; so that the witness may give his evidence with a mind free of all the corrupt influence, which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. This objection is not set forth upon the record; in a civil case a question as to the reception of evidence may be raised on a bill of exceptions, but in a criminal case it cannot be raised upon the record so as to constitute a ground of error. We cannot, therefore, take it into consideration. Whether this circumstance should have any influence elsewhere, is a matter upon which it is not for us to pronounce an opinion.”

Blackburn, Lush, and Mellor, JJ., also stated their opinions, concurring with the Chief Justice in giving judgment for the Crown.

COMMON PLEAS.

Statute of Frauds—Contract to answer for the debt or default of a third person.—The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that, if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3 per cent. upon the amount of the invoice, he would pay the plaintiff cash, and take C. & Co.'s bill "without recourse," in other words, buy the bill of him:—*Held*, that this was a contract to answer for the debt or default of another, within the 4th section of the Statute of Frauds, 29 Car. 2, c. 3. *Mallet v. Bateman*, C. P. 163.

Entertainment of the Stage—Ballet diversissement.—The respondent represented, at a place of public entertainment in London, called the Alhambra, which was licensed only for music and dancing (under 25 Geo. 2, c. 36), an entertainment called a "ballet diversissement," which was thus described by a police magistrate, in a case stated for the opinion of the Court:—"There is an orchestra with a full band of musical performers, a stage and proscenium lighted by foot and side-lights, a curtain, side-scenes, drops, and flies. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, painted to represent rocks, with a cascade of water falling among them from a place thirty feet high. On the wings and at the scenes at the back are painted palm-trees: the whole representing an oriental landscape. From sixty to seventy females, in the ordinary costume of theatrical ballet dancers, came through a large opening at the top of the platform painted as rocks, and danced down them to the stage. Those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage till all had come down. When all were down, they defiled to the right and left. Four were placed on each side in front of the proscenium, with sham musical instru-

ments in their hands, supposed to be played by them to the dancers. The dancers began to dance the pas des poignards (a dance which was originally brought out at Drury Lane Theatre, in an Egyptian scene), each female armed with two daggers, charging through each other's ranks, striking right and left with the daggers, in mimic warfare, then in front as far as the foot-lights. This performance of the dagger-dance ended in several of the females standing over others as if in triumph, and retiring, when others came forward, holding palm-leaves in their hands, and danced, waving them, and formed an avenue, as if expecting an arrival; then a female dancer, who at regular theatres would be called a *première danseuse*, passed down the avenue formed by the other dancers, who retired, while she performed a pas seul with gestures."—*Held*, that, upon this statement, the Court could not hold, as a matter of law, that the performance thus described was an "entertainment of the stage," (within the 23rd section of 6 & 7 Vict. c. 68.) The majority of the Court, however, thought that, if they were dealing with it as a matter of fact, it would be. *Wigan v. Strange*, C. P. 175.

Principal and Agent—Prepayment.—A., a broker, sold some cotton yarn to the defendant. Before its delivery the defendant paid to A. in advance £1000 on his general account. Part of the yarn was sold by A. as agent for the plaintiff on a *del credere* commission. The value of the yarn being more than £1000, the defendant paid the difference to A. in cash, and so balanced the accounts between them. A. did not pay over to the plaintiff the value of his yarn, and became bankrupt:—*Held*, that the defendant was still liable to the plaintiff for the price of his yarn, except to the extent of the cash payment: the advance of £1000 to A. not amounting to a prepayment, because it was on the general account; and the settlement of accounts not constituting payment as against the plaintiff: as an agent, whether acting on a *del credere* commission or not, is only authorized to receive payment in cash, in the absence of any practice or custom to the contrary. *Catterall v. Hindle*, 1 C. P. 186. [This seems an extraordinary decision. If the advance of the £1000 could not be con-

sidered a prepayment, surely the settlement of accounts between the defendant and A. had the same effect as though the defendant had paid the whole sum over to A. and received £1000 back.—Ed. L. J.]

Principal and Surety—Increase of the duties of the principal debtor.—Action on a bond conditioned for the due performance by A. of his duties as collector of the poor rates and of the sewers rates for the parish of St. Anne; the bond to continue in force if A. held either office separately. Breach, that A. received money in both capacities, and failed to pay it over. *Plea*, that before breach an act was passed increasing A.'s duties as collector of sewers rates, and under which he was also elected collector of main drainage rates, by the persons under whom he held his other appointments:—*Held*, bad on demurrer, on the ground that the bond was divisible, and that the plea afforded no answer to the defendants' liability for A.'s breaches of duty as collector of poor rates. *Skillett v. Fletcher*, 1 C. P. 217.

EXCHEQUER.

Statute of Frauds—Parol Variation of a Written Contract.—The plaintiff made a contract in writing, with the defendant, for the sale of certain goods of more than £10 in value, at specified prices, to be delivered within a specified time. Subsequently, and before the time for delivery had arrived, a parol agreement between the parties was entered into, whereby the time for delivery was extended:—*Held*, that the subsequent parol agreement was not "good" for any purpose under 29 Car. II., c. 3, s. 17, and could not operate either as a rescission of the original written contract, or as a new contract for the sale of goods, and that the original written contract might therefore be enforced. *Noble v. Ward*, 1 Ex. 117.

Railway—Carrier—Inequality of Charge.—The defendants, a railway company, were incorporated by an Act which contained an *equality clause*, in the following terms: "All such rates, tolls, and sums shall be so fixed, as that the same shall be taken from all persons alike, under the same or similar circumstances." The defendants were in the habit of charging to the public, on any consignment of goods made to one person, at the same time, though consist-

ing of several distinct parcels, a tonnage rate on the aggregate weight of the whole:—*Held*, that the fact that, of goods so consigned at the same time to one person, and distinctly addressed to him, some articles had also been written conspicuously upon them the names of persons to whom the consignee intended to deliver them, did not entitle the defendants to charge separately for those on which such names were different. Therefore the plaintiffs, who were carriers, were held entitled to recover the difference between sums paid under protest on goods so consigned and addressed by them to themselves, but charged for separately on account of such second name appearing on them, and the amount which would have been payable on the aggregate weight of the consignment.

The defendants, in addition to their business of carriers by rail, carried on the business of common carriers off their line. They charged an equal rate to all the public for carriage on their line between their termini. They also undertook to collect at one terminus, to carry on their line, and to deliver at a place distinct from, and at some distance beyond, their other terminus; and for this they charged a through rate to all the public alike:—*Held*, that the carriage beyond the second terminus was not auxiliary to their business as railway carriers, but was done by them in their business as common carriers generally, and that the plaintiffs were not entitled to deduct the cost of this carriage, and of collection at the first terminus, from the through rate, and to claim to have their goods carried between the termini for the difference. *Baxendale v. London and South Western Railway Company*, 1 Ex. 137.

[Compare *Attorney General v. Grand Trunk Railway Company*, 1 L. C. Law Journal, p. 73. In the English case, the second ground of complaint alleged by the plaintiffs against the defendants was in respect of overcharges, in not allowing to the plaintiffs a sufficient deduction or rebate for the collection, delivery, and cartage of goods, both in London and in the country, when those services were not performed by the defendants. This claim, the principle of which was settled by *Re Baxendale v. Great Western Railway Company*, 28 L. J. (C. P.) 81, was admitted at the argument by the counsel for the company.]

CROWN CASES RESERVED.

False Pretences—Intent.—The crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so. In this case the jury found, in answer to questions put by the Deputy Recorder of the city of Chester, (where the case was tried), that the prisoner's statement, that one Moss wanted some carpets, was false to his knowledge; that the prisoner made the statement to induce the prosecutrix to part with the carpets; that the prosecutrix was induced to part with the carpets by reason of such false pretence; and that the prisoner, at the time he made the pretence and obtained the carpets, intended to pay the prosecutrix the price of them, when it should be in his power to do so. The question for the Court was whether, upon the facts above stated, and the finding of the jury, a verdict of guilty ought to have been entered. The judges were all of opinion that the conviction must be affirmed. *Regina v. Naylor*, 1 C. C. 4.

Threat to accuse of an infamous crime—Intent.—The prisoner threatened A's father that he would accuse A. of having committed an abominable offence upon a mare, for the purpose of putting off the mare and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price:—*Held*, that the prisoner was guilty of threatening to accuse, with intent to extort money, within the meaning of the 24 & 25 Vict. c. 96, s. 47. *Regina v. Redman*, 1 C. C. 12.

Receiving—Delivery by Owner.—Four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel by the same company's line addressed to the prisoner. During the transit the theft was discovered; and, on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter whose duty it was to deliver it, with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, when it was received by the prisoner, who was afterwards convicted of

receiving the goods knowing them to be stolen, upon an indictment which laid the property in the goods in the railway company:—*Held*, by Martin, B., and Keating, and Lush, JJ., (*dissentientibus*, Erle, C. J., and Mellor, J.,) that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction was wrong. *Regina v. Schmidt*, 1 C. C. 15.

Disorderly House.—The defendants, as master and mistress, resided in a house to which men and women resorted for the purpose of prostitution, but no indecency or disorderly conduct was perceptible from the exterior of the house:—*Held*, that the defendants were guilty of keeping a disorderly house. *Regina v. Rice and Wilton*, 1 C. C. 21.

PROBATE AND DIVORCE.

Costs—Unsuccessful Opposition to Will.—The Court refused to condemn, in costs, a next of kin, who had unsuccessfully opposed a will upon information given to him by one of the attesting witnesses, the testator's medical attendant, to the effect that when the will was read over, the testator signified his approval of it by gesture only, and that he (the medical attendant) could not swear that the testator was of a sound mind. *Tippett v. Tippett*, P. & D. 54.

Will—Revocation—Two partly inconsistent Wills admitted to Probate.—If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate. The following passage from Mr. Justice Williams' book on Executors was cited in support of the judgment: "The mere fact of making a subsequent testamentary paper, does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, (so as they be all clearly testamentary,) may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testa-

mentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the former, *as to those parts only*, where they are inconsistent." *Lemage v. Goodham*, 1 P. & D. 57.

Will—Knowledge and Approval of its Contents.—It is essential to the validity of a will, that at the time of its execution the testator should know and approve of its contents. *Hastlow v. Stobie*, 1 P. & D. 64.

Will—Codicil.—Where a will and codicil have been in existence, and the will has been revoked, the Court will not grant probate of the codicil, unless it is satisfied that the testator intended it to operate separately from the will. In the goods of *Greig*, 1 P. & D. 72.

Adultery of Husband—Misconduct of Wife—Judicial Separation refused.—In a wife's suit for dissolution the husband was proved to have been guilty of adultery, but of no other misconduct; and the wife was proved to have been guilty of cruelty, and of wilful separation from the husband before his adultery, and without reasonable excuse, and of wilful neglect and misconduct conducing to his adultery. The Court refused to grant a decree of judicial separation on the ground of the husband's adultery, and in the exercise of its discretion, dismissed the petition. *Boreham v. Boreham*, 1 P. & D. 77.

Dissolution of Marriage—Prostitution of Wife by coercion of Husband.—In a suit by a wife for a dissolution of marriage, it was proved that the husband had been guilty of adultery and of cruelty, and also that he had by threats and by personal violence coerced the petitioner into leading a life of prostitution, and had lived upon the money which she obtained by prostitution. The Court being satisfied that she had led this life contrary to her own will and desire, and in consequence of the coercion of the husband, exercised the discretion given to it, by dissolving the marriage, notwithstanding the wife's adultery. *Coleman v. Coleman*, 1 P. & D. 81.

CHANCERY APPEALS.

Statute of Frauds—Agreement to make Will.—Previously to a marriage the intended husband and wife agreed in writing, that the

husband should have the wife's property for his life, paying her £80 a-year pin-money, and that she should have it after his death; and they gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement; the husband promising, as the wife alleged, that he would make a will giving her all her property. The marriage took place, and the husband made a will accordingly. After his death a subsequent and different will was found:—*Held*, that, under the circumstances, there was not within the *Statute of Frauds* any contract to make a will, and that there had been no part performance which would take the case out of the statute. The marriage was no part performance. Part performance by the *party to be charged* will not take a case out of the statute. *Caton v. Caton*, Law Rep. 1 Ch. 137.

Public Company—Forfeiture of Shares.—The directors of a company made an arrangement with a shareholder who wished to retire from the company, that on payment by him of a sum of money, his shares should be declared forfeited for non-payment of a call which had been made. The money was paid and the shares transferred to the company. Twelve years afterwards the company was wound up, and two years after that an application was made to place the shareholder on the list of contributories:—*Held*, reversing the decision of the Master of the Rolls, that the shareholder ought to be placed on the list, as the arrangement was not within the power of the directors, and was a fraud on the other shareholders. The shareholders in a company are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty. *In re Agriculturist Cattle Insurance Co.*, Law Rep. 1 Ch. 161.

Bankruptcy—Official Assignees.—Sums of money which cannot be appropriated to any particular bankruptcy may be paid to the unclaimed dividend account. *In re Graham*, Law Rep. 1 Ch. 175.

Trade Mark.—No trader can adopt a trade mark so resembling that of another trader,

that persons purchasing with ordinary caution are likely to be misled, though they would not be misled if they saw the two trade marks side by side. Nor can a trader, even with some claim to the mark or name, adopt a trade mark which will cause his goods to bear the same name in the market as those of a rival trader. *Seizo v. Procaende*, Law Rep. 1 Ch. 192.

Joint Stock Company—Shares taken by Executors.—The directors of a Joint Stock Company offered their reserved shares to shareholders and the executors of deceased shareholders, in proportion to the amount of their original shares:—*Held*, that executors who accepted shares must be put upon the list of contributories in their own name, and not in their representative character. The fact that the new shares were offered to, and accepted by, the executors in their representative character, and that the directors had no power to offer the shares to them in any other character, did not preclude the executors from being personally liable as between them and the other contributories. *In re Leeds Banking Co.*, Law Rep. 1 Ch. 231.

Undue Influence—Confidential Relation.—In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is whether the person conferring the benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of but little importance in such cases: they are important only where no such confidential relation exists. The Court will not undo a trifling benefit conferred by one person on another, standing in a confidential relation to him, unless there be *mala fides*. *Rhodes v. Bate*, Law Rep. 1 Ch. 252.

Infant—Religious Education.—A father, being a beneficed clergyman of the Church of England, appointed his widow and a clergyman guardians of his infant children. The widow became a member of the sect of *Plymouth Brethren*. On the application of the other guardian, the Court ordered the children, who were respectively in their fifteenth and

twelfth years, to be brought up as members of the Church of England, and restrained their mother from taking them to a chapel of the Plymouth Brethren. In such a case the Court will pay no regard to the fact that the father was well affected towards dissenters, and associated with them; nor will it be influenced by the wishes of the infants upon the subject. *In re Newbery*, Law Rep. 1 Ch. 263.

EQUITY CASES.

Insurance Company—Lost Policy.—An insurance company paying under a decree of the Court the money payable under a lost policy, are sufficiently indemnified by the decree, and are not entitled to any indemnity from the persons to whom the money is paid. *England v. Tredegar*, Law Rep. 1 Eq. 344.

Insolvency—Foreign Court.—The plaintiff, a native of one of the colonies, alleged that he had taken the benefit of a Colonial Insolvent Act, in consequence of having had a judgment recovered against him in the Colonial Court, from which judgment he had appealed, but unsuccessfully; that the assignee, now in England, had assets in his hands, out of which, if the judgment were reversed, a large surplus would be coming to him; that the judgment was the result of an erroneous decision, and an appeal would probably be successful; but that the assignee, colluding with the judgment creditor, refused to prosecute such appeal; and prayed that the assignee might be decreed to prosecute the appeal, or that the Court would enable the plaintiff to prosecute the appeal in the name of the assignee. *Held*, that there was no sufficient averment that the plaintiff had failed to obtain justice in the ordinary tribunals of his own country to empower the Court to interfere; and demurrer allowed. *Smith v. Moffatt*, Law Rep. 1 Eq. 397.

Specific Performance.—Under an agreement to let a house for three years, at a yearly rent, by which the landlord agreed, at the request of the tenant, to grant him a lease for a term from the expiration of the three years' occupancy, at the same rent, the tenant undertaking to keep the house in repair:—*Held*, that the tenant was entitled, four years after the expiration of the three years' occupancy, to

have the agreement for a lease specifically performed; and that neither an application made by him two years previously for a lease at a reduced rent (which was refused), nor an application to the landlord for payment of an amount expended in repairs (which had been allowed to the tenant), amounted to a waiver of his rights, though the plaintiff was bound to refund the cost of the repairs. *Moss v. Barton*, Law Rep. 1 Eq. 474.

Companies Act—Prospectus—Misrepresentation.—A person who would otherwise be entitled to set aside a contract on the ground of fraud, cannot do so if, after discovering the fraud, he has acted in a manner inconsistent with the repudiation of the contract. Where, therefore, a person was induced to take shares in a company, on the faith of representations contained in the prospectus, which he afterwards discovered to be false, and subsequently to the discovery, instructed his broker to sell the shares:—*Held*, that his name could not be removed from the register. *Ex parte Briggs*, Law Rep. 1 Eq. 483.

Trade Mark—Use of particular Numbers.—The plaintiff, being a thread manufacturer of repute, the defendant bought in the market thread, wound on spools, not made by the plaintiff, of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread, who were known to be accustomed to purchase of the plaintiff thread in the hank for the purpose of winding, and selling it when wound. Defendant sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of the plaintiff's make, and invoiced them to the customer under the description of certain numbers, which the plaintiff had adopted and exclusively used in order to designate his particular manufacture. The customer attached the plaintiff's name and numbers to the spools of thread, and retailed it to the public as of the plaintiff's make:—*Held*, that there was not such a degree of willful misrepresentation on the part of the defendant as would justify the Court in granting an injunction, and bill dismissed, but without costs. The name of a manufacturer, or a system of numbers adopted and used by him, in

order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade mark. *Ainsworth v. Walsley*, Law Rep. 1 Eq. 518.

Vendor and Purchaser—Fiduciary Relation.

—A., a nephew of a former trustee of B.'s property, being commissioned by his uncle to advise B., a young man, aged twenty-three, of intemperate and extravagant habits, in the settlement of his college debts, which amounted to £1000, and to advance him £500 for the purpose, offered to give him £7000 for his undivided moiety of an estate under which there were coal mines, the working of which had been discontinued for fifteen years. Pending the negotiations, A. obtained from C., a mining engineer, an estimate, putting the value of the minerals under the entire estate at £20,000. A separate solicitor was employed for B. A. did not communicate the valuation to B., nor did he suggest to him that he should consult a mineral surveyor before concluding the matter. B. accepted A.'s offer of £7000, and died shortly after executing the conveyance. On bill by B.'s administrator to set aside the purchase:—*Held*, that such a fiduciary relation existed that the suppression from B. of C.'s valuation rendered it impossible for the Court to sustain A.'s purchase. *Tate v. Williamson*, Law Rep. 1 Eq. 528.

Partnership—Specific Performance.—Partnership articles provided that no partner should sell his shares except as follows:—

That the partner desirous of selling should offer the shares to his copartners collectively: if they should decline, then to the partners desirous of collectively purchasing; and if none such, then to the partners individually: after which he might sell to a stranger. One of four partners offered his shares to the other three collectively (one of whom to his knowledge would not purchase). The remaining two declared their willingness to accept, and were told that no offer was made to them:—*Held*, that the offer to the three enured for the benefit of the two, and specific performance decreed accordingly. *Homfray v. Fothergill*, Law Rep. 1 Eq. 567.

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APPEALS IN FORMA PAUPERIS.

In the case of *Legault* and *Legault*, 2 L. C. Law Journal, p. 10, it was decided, in March last, that an appeal could not be brought in *forma pauperis* to the appeal side of the Court of Queen's Bench in Lower Canada, Judge *Mondelet*, however, dissenting, and being of opinion that such appeal should be allowed. About the same time the question of appeals in *forma pauperis* came up in England, and from the report of the case, *Drennan v. Andrew*, Law Rep. 1 Ch. 300, it would seem that the practice on this point has varied. Some of the precedents furnished by the Registrar, and stated in a note to the report, are rather curious.

By 11 Hen. VII. c. 12, poor persons were allowed to sue in *forma pauperis*. By 23 Hen. VIII. c. 15, a pauper was not to pay costs, if he was unsuccessful, but was to suffer other punishment in the discretion of the judge. Accordingly the common form of the order allowing a poor person to sue in *forma pauperis* contained this clause: "But if the matter shall fall out against the plaintiff, he shall be punished with whipping and pillory." There are many orders of the time of Queen Elizabeth which contain this clause; and there was one instance, in 1596, in which Sir Thomas Egerton (afterwards Lord Chancellor *Ellesmere*) ordered a female pauper plaintiff to be flogged. At this time no suitor could regularly appeal from a decree in Chancery. It is said in some of the old orders in the time of Elizabeth, speaking of the Court of Chancery, "from which Court the subject has no appeal." As to persons not paupers, this practice was changed, and their right to appeal established; but as to paupers there appears to have prevailed, as late as 1774, and perhaps later, an idea that a pauper could not appeal. In *Bland v. Lamb*, the proposition that a pauper could not appeal is said to have been adverted to *arguendo* by Mr. Pem-

berton, and condemned by Lord *Eldon*, who is stated to have said "it was a very singular proposition; and that he could not see why, because a party was poor, the Court should not set itself right."

Lord Chancellor *Cranworth*, in *Drennan v. Andrew*, directed the petition of appeal to be received. He said there appeared to be some conflict of practice on the point, but he was of opinion that where the common order to sue in *forma pauperis* had been obtained at any time during the suit, such order was sufficient to carry the pauper through all the stages of the suit; and that in that case, an order for leave to appeal in *forma pauperis* was unnecessary.

CONTEMPT OF COURT.

To the Editor of the L. C. Law Journal.

The subject of "Contempt of Court" having lately been rather prominently before the Lower Canadian legal world, the following opinion, given by Mr. Erskine, (afterwards Lord High Chancellor) in a letter to a gentleman in high reputation at the bar in Dublin, may probably prove interesting:—

"Bath, January 13th, 1785.

"The right of the Superior Courts to proceed by attachment, and the limitations imposed upon that right, are established upon principles too plain to be misunderstood.

"Every Court must have power to enforce its own process, and to vindicate contempt of its authority, otherwise the laws would be despised; and this obvious necessity at once produces and limits the process of attachment.

"Whenever any act is done by a Court which the subject is bound to obey, obedience may be enforced, and disobedience punished, by that summary proceeding (committal for contempt). Upon this principle attachments issue against officers for contempts in not obeying the process of Courts directed to them as the ministerial servants of the law, and the parties on whom such process is served may in like manner be attached for disobedience.

"Many other cases might be put, in which

it is a legal proceeding, since every act which tends directly to frustrate the mandates of a Court of Justice is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of such process, viz. *That it can only issue in cases where the Court which issues it has awarded some process, given some judgment, made some legal order, or done some act which the parties against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely and disrespect in the face of the Court, or of its minister charged with the execution of its acts.*

"But no crime, however enormous, even open treason and rebellion, which carry with them a contempt of all law, and of the authority of all Courts, can possibly be considered as a contempt of any particular Court, so as to be punished by attachment, unless the act which is the object of that punishment be in direct violation or obstruction of something previously done by the Court which issues it, and which the party attached was bound by some antecedent proceeding to make the rule of his conduct. A constructive extension of contempt beyond the limits of this plain principle would evidently involve every misdemeanor, and deprive the subject of the trial by jury in all cases where the punishment does not extend to touch his life.

"The peculiar excellence of the English government consists in the right of being judged by the country in every criminal case, and not by fixed magistrates appointed by the Crown. In the higher orders of crimes the people alone can accuse, and without their leave, distinctly expressed by an indictment found before them, no man can be capitally arraigned; and in all the lesser misdemeanors, which either the Crown, or individuals borrowing its authority may prosecute, the safety of individuals and the public freedom absolutely depends upon the well-known immemorial right of every defendant to throw himself upon his country for deliverance, by the general plea of 'not guilty.' By that plea, which in no case can be demurred to by the Crown, or questioned by its judges, the whole charge comes before the jury on the general

issue, who have jurisdiction co-extensive with the accusation, the exercise of which in every instance the authority of the Court can neither limit, supersede, control, nor punish.

"Whenever this ceases to be the law of England the English constitution is at an end! And its period in Ireland is arrived at already, if the Court of K. B. can convert every crime by construction into a contempt of its authority, in order to punish by attachment."

The above needs no comment. Contempt has never been clearly and precisely defined in the law books, for the simple reason that it is impossible to do so; but what approaches as near as possible to a definition may be extracted from that part of the above letter which is printed in italics.

The question, however, which has seldom, if ever, come up in England, is likely soon to receive the fullest ventilation before the Judicial Committee of the Privy Council, before whom, on the 3d of last November, came up the following case:—

Present—Lord WESTBURY, Sir E. V. WILLIAMS, Sir J. COLVILLE, and Sir L. PEEL.

IN RE LAWRENCE M'DERMOTT.

Mr. COLERIDGE, Q.C., applied to their Lordships on the part of Lawrence M'Dermott, of Water-street, New Town, City of George-town, British Guiana, the proprietor and publisher of the *Colonist* newspaper, for leave to appeal against certain orders and proceedings of the Supreme Court of Civil Justice of the colony of British Guiana, by which as the conductor of the newspaper he had been committed to prison for a period of six months for an alleged contempt. The learned counsel presented the case as one of peculiarity. The applicant in his petition stated that he was a British subject, and the proprietor and publisher of the newspaper mentioned; that for some time past great dissatisfaction had existed as to the proceedings of the Supreme Court, and in reporting the proceedings he had allowed them to be commented upon in the *Colonist* newspaper in respect to the case of one of the officers, Mr. Campbell, who had been compelled to resign his office. Shortly after the 29th of March last he received an order of the Court, setting forth the complaints made, that he should attend on the 4th of April to show cause why an attachment should

not be issued against him for contempt. The petitioner appeared before Chief Justice Beaumont and Mr. Justice Beete, who, without hearing certain objections, adjourned the matter to the 6th of the same month. He again appeared before the Court as directed, and the Attorney-General and Mr. Gilbert were his counsel; and after hearing them he was ordered again to appear on the 10th of the same month, when it was objected that the order made in the matter was irregular. The Court overruled the objection, and offered to allow further time, but his counsel declined to show cause under the order made. Mr. E. C. Ross, the informant, was heard; and the decision was deferred till the 13th of April, on which day the Court, consisting of the Chief Justice Beaumont and Mr. Justice Beete, gave judgment that the petitioner had been guilty of a contempt by publishing matter in the *Colonist* scandalously reflecting on the Court and the administration of justice, and for such contempt he was ordered to be imprisoned in Her Majesty's gaol of George-town for the term of six calendar months. The petitioner further alleged that he was delivered into custody, and applied for leave to appeal to the Queen in Council, and had been refused on the ground that it was not an appealable case. That he had been advised that his only remedy was to appeal to the Privy Council for liberty to appeal, and in his petition he complained of the proceedings as illegal, and prayed an inquiry into the matter as well for the sake of his own character and reputation as for the right and due administration of justice. Mr. Coleridge asked their Lordships to grant permission to the petitioner to appeal, and then the matter could be inquired into.

Lord WESTBURY consulted the other members of the Committee, and said their Lordships would give leave to the petitioner to appeal, but would reserve to themselves the right to consider whether it was allowable.

An order was made to appeal without prejudice to the competency of the appeal. W.

Sir William Bovill, the Solicitor General, has succeeded to the Chief Justiceship of the Common Pleas, in the place of Sir William Erle retired.

CHIEF JUSTICE ERLE.

On the 26th of November last, the Lord Chief Justice presided for the last time in the Court of Common Pleas. At the rising of the Court, the Attorney-General, Sir John Holt, in the presence of the whole Court and a crowded Bar, addressed the retiring judge on behalf of the Bar. The Attorney-General remarked in the course of his address :

"My Lord, we all feel and desire to acknowledge that, under your presidency in this Court, the great judicial duty of reconciling, as far as may be, positive law with moral justice has been satisfied. The letter of the law that kills, and the mere discretion of the judge, which has been well said to be the law of tyrants, have been alike kept in due subjection. Learning, experience in affairs, wise administration have been so combined that, with the assistance of the eminent judges associated with you on that Bench, the laws of England have been exhibited in their true aspect as the exponent of the rights and duties of her citizens, and the guardian of their liberties. The Court of Common Pleas, under your presidency, my Lord, has attained the just confidence of the suitor, the public, and the profession. But, my Lord, I shall not be forgiven by my colleagues if I stop here. I shall not be forgiven if I fail to express our admiration for the simplicity and elevation of character that have adorned that administration, and our affectionate regard for the private and social qualities, the kindness and the courtesy that have been displayed on the Bench, and in the intercourse of private life. Our homage is due and is paid alike to the worth of the man and the dignity of the judge.

"My Lord, it is no idle ceremony that induces us thus to intrude upon you. We know that your Lordship would, had it been possible, have retired from the Bench to-day without public observation. But it was not possible. There are occasions on which the impulses of the heart must be obeyed; and this was one. The universal feeling insisted on public expression.

"My Lord, it may be right, and since it is your will we endeavour to think it is so, that in the full possession of the greatest judicial

qualities, in the maturity of your faculties, your Lordship should retire from us and leave the active duties of ordinary judicial life. They have, no doubt, been incessant, severe, excessive; but we may be pardoned if we bear in mind that your Lordship is still a member of one of our highest judicial appellate tribunals; and express our hope that the law and the country may still for long years to come, so far as may be consistent with your Lordship's ease and retirement, derive the benefit of your great wisdom and experience."

The Lord Chief Justice replied as follows:

"Mr. Attorney,—My words in reply must be few. I return my earnest thanks to you and to all whom you represent on this occasion. I have laboured to do justly according to law, and to obey humbly the Power that gave my sense of right. If any duty in which I had part has been well performed, the honour is mainly due to those who in their respective departments have had to co-operate with me in the noble work of administering justice. It is eminently due to the Bar. I have seen a long succession of advocates, and among them men of the highest worth, awaying important interests by their words, always speaking with inflexible integrity, and making the way of duty plain before the judge—men that I delight to think of with confirmed respect and regard. I have happiness in knowing that the estimation of the Bar is well maintained, and I shall ever retain the deepest interest in its honour for the sake of its members and of the public. Above all, I desire that the due share of honour should be given to my brethren of this Court, with whom I have been taking counsel and interchanging mind for years past, to my unspeakable benefit. I may not in their presence say all that I feel towards them, but I cannot refrain from adding that their affectionate help has been the sunshine in my path, and the breath of my judicial life.

"I now take my leave. Though sensible of manifold defects, I still venture to believe that I have devoted the best of my abilities to the duties of my office, unceasingly down to the present time, when I find need for some abatement of work, and your approval seems to sanction the hope that I may not have

laboured altogether in vain. Those words of approval pronounced by the Attorney-General in this assembly to-day, are to me a grand support and reward. I am heartily thankful to you for them, and they are endeared to me by the genial kindness of your farewell."

SIR JAMES L. KNIGHT BRUCE.

The Right Hon. Sir James L. Knight Bruce, whose resignation of the high office of Lord Justice of Appeal in Chancery was recently announced, died on the 7th November, at the Priory, Roehampton, at the age of 75. Born in 1791, a younger son of Mr. John Knight, a gentleman of independent property in Devonshire, the late Sir J. Knight Bruce, then Mr. Knight, was, in 1812, admitted a student of Lincoln's Inn, and in 1817 called to Bar. After attending the Welsh circuit for a short time he exchanged the Common Law for the Equity Bar, where his great talents and industry soon secured a large practice. In 1829 he was appointed a King's Counsel, and in 1831 was returned to Parliament for Bishop's Castle. In 1834 he received the degree of D.C.L., "*honoris causa*," from the University of Oxford. A Conservative in politics he was one of the Counsel heard at the Bar of the House of Lords in 1835 against the Corporation Reform Act. In 1837, the year in which he assumed the additional surname of Bruce by Royal license, he closed his Parliamentary career by an unsuccessful struggle for the representation of the borough of Cambridge; and in 1841, at the age of 50, was raised to the Bench as Vice Chancellor. Ten years later, in 1851, on the creation of the Court of Appeal, Lord Cranworth and Sir J. Knight Bruce were selected as the first Lords Justices. In the following year, upon Lord Cranworth's elevation to the Woolsack, Sir George Turner was appointed as his colleague, and Sir J. Knight Bruce became senior Lord Justice, a position he only resigned a fortnight before his death.

THE TRIAL OF LAMIRANDE.

The following report of the trial of Lamirande is from the London *Daily News*. We may state here that the English Government

declined to take further action in the matter, on the ground that whatever irregularity there may have been in the extradition, was the fault of the Canadian officials, and not of the French detective.

The indictment very shortly set forth that the prisoner had, by fraud and forgery, embezzled various sums of money belonging to the Bank of France, amounting in the whole to 700,000fr. After the reading of the indictment, M. Lachaud, the prisoner's counsel, took a preliminary objection. He handed in written exceptions submitting that the extradition under and by virtue of which the prisoner stood at the bar, ought to be declared null and void as illegally obtained. The document charged that French courts of law were competent to examine the regularity of the extradition of any prisoner brought before them, and that this principle was laid down by the Court of Cassation on May 9, 1845. It then stated the well known facts that pending the argument on a writ of *habeas corpus* before Judge Drummond, in Canada, and after an adjournment had been asked for by the counsel for the Bank of France, Lamirande was fraudulently, and in breach of international law, carried off and sent a prisoner to France; that the order of the Governor-General of Canada, under cover of which the extradition was effected, was obtained by fraud and surprise; and that Judge Drummond, before whom the matter was pending, had subsequently declared judicially that the extradition was illegal.

M. Gast, the advocate-general, denied that the court had anything to do with the legality of the extradition. Its only business was to try the prisoner whom it found before it, no matter how he was brought there. Any irregularity in the extradition was a question between the two governments. Even if the court were to annul the extradition it would be an idle proceeding, in no way beneficial to the prisoner, because he might be arrested *de novo* as he left the bar. There was no law which said, assuming the extradition to have been illegal, that the prisoner was entitled to a safe conduct to the frontiers in order that he might be restored to the *status quo*. Extradition treaties were not made for the benefit of criminals, but for high international purposes, and an accused party, once before a French court, was not competent to argue that his arrest has been illegal.

M. Lachaud, in reply, said that Lamirande had been "stolen" from England.

The President here interrupted him and said—M. Lachaud, I cannot allow that expression; you are not now addressing a jury, and such observations are lost upon the court.

M. Lachaud persisted in the use of the word "stolen," which he said was perfectly borne

out by Judge Drummond's judgment, which, out of respect to the court, he would not read, although the court knew what it said. He contended that, according to the Court of Cassation and the doctrine of M. Helie, a great text writer, the court had at least a discretion to consider whether the extradition was legal.

The Court overruled the objection.

An attempt, which was very nearly successful, was then made to entrap Lamirande into a consent to be tried upon all the charges in the indictment. In answer to the first question of the president he said he would consent. But M. Lachaud rising to insist that he did not understand the meaning of the question, the court adjourned for a few minutes to allow him to consult with his counsel. He subsequently said that he wished to profit by all the irregularities of his extradition, and that he would not consent. Thereupon M. Lachaud contended that the triple charge on which he was indicted must be submitted to the jury, namely, forgery, abuse of confidence, and embezzlement. The Court, however, held that in default of his consent he must be tried for the forgery only, that being the only accusation which justified his extradition. The object of M. Lachaud was to have a case for the Court of Cassation on the ground of the want of the prisoner's consent. He now hopes to prove that the charge of forgery is not technically sustainable.

Lamirande, when interrogated by the President, confessed that he had robbed the Bank of France of 704,000fr., that the abstractions were going on for nearly three years, and that every day during that period he submitted to the manager of the Poitiers branch, a falsified balance. His system was to take *rouleaux* of gold and replace the coin by silver pieces in bags, supposed to contain gold. He expressed contrition, especially because his crime tended to throw suspicion upon his respectable chief, M. Bailly. The examination relative to what he had done with the stolen money is interesting.

Q. What did you do with the money?—A. I gave 7,000 fr. to an English interpreter, who, in return, informed against me. Then I am persuaded that I was robbed of three securities of the value of 10,000fr., at London and Liverpool. I was weary; I had passed several nights, as many as nine, I think, at play—for play has been my ruin. Further, I trusted a sum of 6,000 fr. to a Canadian who was going home.

Q. That money has been restored?—A. Yes.

Q. What next?—A. I spent a great deal of money at New York—somewhere about 1,500fr.

Q. But you have upwards of 700,000fr. to account for.—A. I cannot tell what has

become of the money. At New York I had to do with some advocates, to whom I entrusted 191,000frs. I agreed with them that if I did not resist the extradition they would send 135,000fr. for me to make restitution in France.

Q. So that they kept 56,000fr. for themselves?—A. The police agent told me that when he threatened them with prosecution they sent the Bank of France 25,000fr.

Q. You have given back something?—A. Yes, the amount stated in my memorandum.

Q. Go on with your narrative.—A. Before leaving France I gave money to two women.

Q. You are yet a long way off the sum total.—A. Ah, but the money I gave to my American advocates.

M. Lachaud.—They are no advocates.

The President.—Yes, they are New York advocates.

M. Lachaud.—They are not worthy of such a title. They are thieves' accomplices.

Q. Well, now tell us what you have done with the surplus?—A. I cannot without doing an injury to innocent persons.

Q. You must answer. It has nothing to do with the question at issue, but it is a question of morality.—A. I cannot tell.

M. Lachaud.—Will the Court allow me to speak? I have a revelation to make.

The President.—You can make your revelation in your speech, but we cannot ask the prisoner continually whether he agrees with his counsel.

Lamirande.—I refuse to answer.

After some further questions about the debts which the prisoner had paid, M. Lachaud, after rising several times to speak, and being told as often by the president that he must wait until the examination was closed, exclaimed, stretching out a bag of money, I have more than a revelation. I have a fact of importance to the trial which must now be made known. My client tells me that he cannot say what has become of the stolen money for fear of injuring innocent parties. I have in this bag 110,200 fr., of which I now make restitution in Lamirande's name, and hand the money over to the counsel for the Bank.

M. Bourreau (the counsel).—I do not feel authorized to receive it; but here is an officer of the Bank who will take the money and give a receipt.

M. Lachaud.—We do not want a receipt. Here is a restitution. (Great sensation.)

Q. You have still, after all the explanations, 280,000 frs. to account for. What has become of the sum remaining?—A. I cannot say.

Q. I cannot understand what interest you can have in making this restitution, instead of frankly admitting that you had the money, in answer to the question I had just now put to you.

Lamirande.—My counsel waited for a favourable moment.

M. Lachaud.—One word.

The President.—Oh, M. Lachaud, it is unnecessary.

M. Lachaud.—I beg pardon; it is most necessary. The prisoner neither knows when I had this money, nor who brought it to me. My learned friend who is with me, M. Lepetit, and myself alone know. The prisoner confided something to me which led us to use our endeavours to recover some of this money. We have recovered the sum handed over. "Who has the rest?" we ask the prisoner. "I cannot tell you," said he; "I will not bring that person to sit by me at the bar."

M. Lepetit.—We alone know where the money came from; the prisoner does not.

M. Lachaud.—And I wish to say that I would not have given him the money in prison. We have restored 110,000fr.; I only wish it were in our power to give back the rest.

The President.—This leads me to repeat that Lamirande would have done better to have answered candidly when I examined him.

This closed the prisoner's examination. The witnesses called merely proved what was not denied. The sentence was ten years' imprisonment.

BAR OF LOWER CANADA.

Diplomas registered in the Registers of the General Council from the 15th November, 1866, up to the 19th December, 1866.

NAMES.	WHERE ADMITTED.	DATE OF COMMISSION.	DATE OF REGISTRATION.
<i>Archambault</i>			
F. X.	Montreal...	12 Nov., 1863	12 Dec., 1866
<i>Alary, D.</i>	Montreal...	30 Aug., 1864	14 Dec., 1866
<i>Bellemare, U.</i>	Montreal...	8 May, 1866	21 Nov., 1866
<i>Berthiaume,</i>			
<i>Aquila</i>	Montreal...	6 Dec., 1864	6 Dec., 1866
<i>Beaupré, D.</i>			
<i>mase</i>	Montreal...	2 June, 1862	14 Dec., 1866
<i>Bourgouin,</i>			
<i>Nazaire H.</i>	Montreal...	14 Sept., 1863	14 Dec., 1866
<i>Choquet, Am-</i>			
<i>broise</i>	Montreal...	14 Nov., 1865	15 Nov., 1866
<i>Chabot, Mar-</i>			
<i>cil Hubert</i>	Quebec....	5 July, 1864	24 Nov., 1866
<i>Champagne,</i>			
<i>G. Antoine</i>	Montreal...	2 Nov., 1863	1 Dec., 1866
<i>Casley, Mic.</i>	Montreal...	4 Jan., 1864	1 Dec., 1866
<i>Cardet, J.</i>			
<i>E.</i>	Quebec....	8 July, 1866	4 Dec., 1866
<i>Carréau, J.P.</i>	Montreal...	2 June, 1862	15 Dec., 1866
<i>Champagne,</i>			
<i>Charles L.</i>	Montreal...	5 Sept., 1865	15 Dec., 1866
<i>Desplaines,</i>			
<i>F. X.</i>	Montreal...	1 May, 1865	27 Nov., 1866
<i>Juggan, J.</i>			
<i>H.</i>	Montreal...	5 April, 1866	30 Nov., 1866
<i>Dawson, P.</i>			
<i>Paul</i>	Montreal...	5 Aug., 1866	30 Nov., 1866
<i>Desjardins,</i>			
<i>T. C. Alph.</i>	Montreal...	2 June, 1862	5 Dec., 1866
<i>De la Ronde,</i>			
<i>Gaspard R.</i>	Montreal...	7 Dec., 1863	5 Dec., 1866
<i>Desilets, Al-</i>			
<i>fred</i>	Montreal...	14 Dec., 1864	7 Dec., 1866

BAR OF LOWER CANADA.

Diplomas registered in the Registers of, the General Council.—Continued.

NAMES.	WHERE ADMITTED.	DATE OF COMMISSION.	DATE OF RE- GISTRATION.
Dubreuil, Jos.	Montreal...	8 Feb., 1866	11 Dec., 1866
Fertol....	Montreal...	9 Oct., 1866	11 Dec., 1866
Doran, Dan.	Quebec....	9 Oct., 1866	11 Dec., 1866
Demers, Am.	Montreal...	7 Dec., 1866	11 Dec., 1866
Desilets, Jos.	Montreal...	6 Nov., 1866	13 Dec., 1866
Desars, La.	Montreal...	13 Dec., 1866	13 Dec., 1866
Desjardins,	Montreal...	9 Nov., 1866	15 Dec., 1866
Arthur....	Montreal...	4 Aug., 1866	18 Dec., 1866
Dorion, Chs.	Montreal...	4 Sept., 1866	18 Dec., 1866
David, Ach.	Montreal...	19 Dec. 68	19 Dec., 1866
David, Fer-	Montreal...	17 Mar. 59	5 Dec., 1866
dinand....	Montreal...	7 July, 1862	13 Dec., 1866
Foley, Jos. A.	Montreal...	4 June, 1866	23 Nov., 1866
Fontaine, C.	Montreal...	6 April, 1866	24 Nov., 1866
Geoffroy C.	Montreal...	6 April, 1866	30 Nov., 1866
Girard, F. X.	Montreal...	21 April, 1866	15 Dec., 1866
Girouard, D.	Montreal...	9 Sept., 1864	15 Nov., 1866
Gosselin, M.	Montreal...	2 June, 1862	6 Dec., 1866
Joseph, Jos.	Montreal...	8 July, 1866	7 Dec., 1866
Olivier....	Montreal...	8 Aug., 1866	8 Dec., 1866
Kelly, John P.	Montreal...	5 Jan., 1866	11 Dec., 1866
Lippi, Pierre	Montreal...	8 July, 1866	11 Dec., 1866
Samuel....	Montreal...	6 Sept., 1866	13 Dec., 1866
Lamier, Wm.	Montreal...	6 April, 1866	17 Dec., 1866
Legendre, N.	Montreal...	5 April, 1866	19 Dec., 1866
Laferrière,	Montreal...	5 June, 1866	30 Nov., 1866
Alex. Aures	Montreal...	5 Sept., 1864	5 Dec., 1866
Lancel, Rich.	Montreal...	14 May, 1864	13 Dec., 1866
S....	Montreal...	8 Feb., 1866	13 Dec., 1866
Leblanc, Jos.	Montreal...	6 Oct., 1866	14 Dec., 1866
Lachapelle	Montreal...	5 Dec., 1866	15 Dec., 1866
Alphonse..	Montreal...	10 Sept., 1862	17 Dec., 1866
Mongean, J.	Montreal...	27 Sept., 1866	7 Dec., 1866
N....	Montreal...	5 June, 1866	24 Nov., 1866
McConville,	Montreal...	7 Jan., 1862	17 Dec., 1866
Henri Jean.	Montreal...	8 Nov., 1862	17 Dec., 1866
Marsan, An.	Montreal...	10 Nov., 1866	27 Nov., 1866
T....	Montreal...	6 June, 1866	13 Dec., 1866
Maillet, La.	Montreal...	5 Feb., 1866	13 Dec., 1866
Ludger....	Montreal...	15 May, 1866	15 Dec., 1866
March, Chs.	Montreal...	22 Nov., 1866	24 Nov., 1866
Mathieu, M.	Montreal...	8 Feb., 1866	21 Nov., 1866
Mirault, G.H.	Montreal...	5 Jan., 1867	11 Dec., 1866
Quimet, A.B.	Montreal...	1 Oct., 1860	13 Dec., 1866
Charles....	Montreal...		
Parkin, Edw.	Quebec....		
Bradley....	Quebec....		
Paré, Louis	Montreal...		
Tréfilé....	Montreal...		
Quenel, An-	Three Riv's		
guste....	Three Riv's		
Rayford, E.	Montreal...		
Hawkins....	Montreal...		
Beard, Sev.	Montreal...		
Dominique.	Montreal...		
Richard, Jos.	Montreal...		
Urgèle....	Montreal...		
Robidoux, J.	Montreal...		
Emery....	Montreal...		
Simard, Jos.	Montreal...		
Adélaide....	Montreal...		
Thibault, Ch	Montreal...		
Tranchemon-	Montreal...		
tagne, F. R.	Montreal...		
Truesdell, E.	Montreal...		

GONZALVE DOUTRE,
Secretary of the General Council.

"to inquire into the expediency of a Digest of Law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form, the Law as embodied in Judicial Decisions:"—Baron Cranworth; Baron Westbury; Sir Hugh Cairns; Sir J. P. Wilde; the Rt. Hon. Robert Lowe; Vice Chancellor Wood; Sir George Bowyer; Sir Roundell Palmer; Sir J. G. Shaw Lefevre; Sir Thomas Erskine May; Mr. Daniel, Q. C.; and Messrs. Thring and Reilly, Barristers-at-Law.

SIR HUGH CAIRNS.—The youngest Judge in England is Sir Hugh Cairns, Judge of the Court of Appeal in Chancery, who is in his forty-ninth year.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.—APPEAL
SIDE.

MONTREAL, Dec. 7th, 1866.

M'DONALD, (*tiers saisi* in the Court below,) Appellant; and NIVIN ET AL., (plaintiffs contesting in the Court below,) Respondents.

Saisie Arrêt—Deed of Sale by Garnishee declared fraudulent.

M. obtained from all the creditors of D., an insolvent grocer, a subrogation in their rights, and a transfer of the stock. He allowed D. to continue the sale of goods and collection of outstanding accounts on his behalf, but reserved to himself the right to take possession of the stock and premises at any time he pleased. D. made new purchases of goods from N. and others, with M.'s knowledge, and failed to pay for them. M. took possession of the stock, including the new goods, and sold the whole estate to another party. N. having served a *saisie arrêt* upon M.:

Held, that the sale by M. was in fraud of the new creditors of the insolvent, and that M. must pay the proceeds into Court, to be distributed among said creditors.

This was an appeal from a judgment of the Superior Court, at Montreal, rendered by Monk, J., on the 26th January, 1866, maintaining a contestation of the declaration of the appellant as *tiers saisi*, in a cause in which the respondents were plaintiffs, against Robert T. Durrell, defendant. The facts are detailed sufficiently in the remarks of the judges.

DIGEST OF ENGLISH LAW.—The following judges and eminent persons have been appointed to be Her Majesty's Commissioners

BADGLEY, J. Durrell, a former clerk of M'Gibbon, established himself in business as a grocer in May, 1862, and failed early in July, 1863. On the 13th of July, 1863, by deed of cession, he assigned his stock-in-trade, outstanding debts, and unexpired lease, to assignees, for the benefit of his creditors, with power to wind up his estate. On the 31st of July, M'Gibbon, by deed between him, Kinloch, the assignee, the debtor Durrell, and the creditors generally, purchased absolutely the stock and debts of the bankrupt, and took subrogation from his creditors of their several claims against him, in consideration of 7s. 6d. in the £., which he undertook to pay to them. The composition was afterwards paid. On the 31st of August following, by another deed, the appellant, in consideration of \$3880 paid by him to M'Gibbon, purchased from the latter all his right, interest and property in Durrell's late stock and debts, as they then were unsold and uncollected, as well as the unexpired portion of his lease; and M'Gibbon specially subrogated the appellant in and transferred to him the creditors' claims against Durrell, with his own, together amounting to upwards of \$6000. The appellant made his purchase without any warranty by M'Gibbon, and declared himself satisfied with the goods purchased, as having seen them, and having them in actual possession.

On the 22nd Sept. following, by deed, the appellant constituted Durrell his agent to realize the remaining stock, and to collect the outstanding debts, but for no other purpose, binding Durrell to make weekly payments to him of the moneys received from sales and collections, and reserving to himself the power to take possession and summarily to eject Durrell even without notice, and at any time. He agreed, however, to transfer to Durrell the balance of stock and goods remaining, when Durrell should repay to him the \$3880 paid to M'Gibbon, with interest and ten per cent. commission. Durrell ratified the appellant's previous purchase from M'Gibbon, and acknowledged his indebtedness to appellant as his creditor, representing the creditors' claim transferred to him. From the time of the appellant's purchase from M'Gibbon in August, the shop had been kept

open in charge of Durrell, whose sign still remained visible as usual, and Durrell went about making purchases in his own name, to enable him to continue the necessary supply of stock, the appellant in some instances making advances in money to assist him in his purchases, in others endorsing his paper. This continued until the business premises were closed by the appellant on the 23rd Dec. following, and during that time it is in evidence that Durrell made purchases at an average of about \$800 per month, buying, selling and collecting in his own name, with the knowledge of the appellant. The deed between the appellant and Durrell, as just stated, was executed on the 22nd Sept., and on the 1st Oct. Durrell first purchased goods from the respondents, and continued his purchases until the 31st of that month, when they amounted to upwards of \$600, the recovery of which has given rise to these proceedings.

On the 23rd December, the appellant exercised his right, and took absolute possession of the premises, with all its stock of goods, and closed the shop until the 4th January, 1864, when, by deed of that date, he sold and conveyed to Burke all the goods and merchandizes in and about and upon the premises, with also the unexpired lease, in consideration of \$2200, which he thereby acknowledged to have received in cash from the purchaser Burke. Durrell became a party to this deed at appellant's request, ratified the sale, and relinquished to Burke all right, if any he had, in the effects sold. This is stated in the deed. At the time of the appellant taking possession of the goods in the premises, and of his sale of them to Burke in his own name as his own property, he knew that Durrell was a bankrupt, that he himself was Durrell's creditor for upwards of \$6000 as the representative of Durrell's creditors, and also a further creditor for advances and endorsements for him since the deed between them in September; that he knowingly allowed Durrell in his own name to supplement his selling stock to considerable amounts, during the entire period receiving the proceeds of sales and collections for his own account; that these proceeds came from the appellant's old stock purchased from M'Gibbon

and also from Durrell's purchase of new goods, and from collections of accounts due, and that the sale to Burke necessarily included what may have remained of the original stock unsold, as well as of the new goods and supplementary purchases,—in other words, the goods of the respondents and others from whom Durrell had purchased. As stated, Durrell's purchases monthly averaged about \$800, whilst his sales were about \$600.

In this position of things, the respondents sued Durrell and obtained judgment against him on the 12th January, the action having been instituted before the appellant's sale to Burke, and the judgment was followed up by writs of *scito-arret* in the hands of the appellant and of Burke, on the 27th of the same month. The *tiers saisis* duly appeared and declared that they had nothing belonging to Durrell, and owed him nothing. The declaration made by Burke has not been contested, he having paid for his purchase, as shown in his deed; but the respondents contested the appellant's declaration, alleging fraud practised by the appellant against the creditors of Durrell generally, and against the respondents specially, and requiring the appellant to account for the \$2200 received in cash from Burke, or to pay them their debt. Issue was thereupon joined, and evidence adduced. It is from the record and from the written and oral evidence contained in it, that the preceding statement has been drawn, and it will be apparent that the appellant's pretension to retain exclusive possession of the whole amount of the cash received from Burke, must be tested by his own acts, by which the fair and honest rights of the parties will be settled.

The appellant well knew the insolvency of Durrell, from the date of the latter's assignment to assignees for the benefit of his creditors. He knew that he was Durrell's creditor for the amount of his previous indebtedness to his former creditors, and also to himself for his later advances and endowments. He knew that he allowed Durrell, the insolvent, to appear as the actual shopkeeper, and to make supplementary purchases for the shop, which was actually under his own control. He knew that he was receiving from Durrell's

sales and collections money, not only received from the old stock, which was clearly and honestly the property of the appellant, but also from the new stock of goods purchased, which was in no way his, and which from the record he had no right to control; and finally he knew that he took into his possession not only the remains of his own unrealized stock, but also all that remained unrealized of the supplementary goods, which were clearly claimable by Durrell's new creditors, and converted the whole to his own profit. There can be no doubt of this, because the appellant himself admits the fact, and says on *faits et articles*, "that he realized by his sale to Burke, from those goods, &c., sold to him, \$2200, which, with goods bought by himself from Durrell, and with money previously received from him, paid him, appellant, for the sum he paid M'Gibbon, (\$3880), and also for advances made by him to Durrell in payment of goods (purchased by Durrell), also for rent of store, assessments, &c."

Now, although the appellant might justly claim the proceeds of his own stock, he could not honestly or legally, in the face of Durrell's insolvency, appropriate to himself, and for his own advantage, the supplementary goods purchased by Durrell from others, nor retain the \$2200 to himself alone. That money manifestly represents the rights of other creditors of Durrell as well as of the appellant, which he cannot hold without fraud, and therefore that money should in fairness and justice be brought into Court, to be acted upon in the interest of Durrell's creditors, according to their legal rights. The judgment of the Court below is quite equitable in that respect, but must be corrected in the figure of \$2400 to \$2200, and with the addition that the appellant be adjudged to pay to the respondents the costs of the contestation raised by them against his declaration as *tiers saisi*, upon the said writ of attachment; and, finally, the whole with the costs of this appeal, which is dismissed.

McNAMAR, J., dissenting. The only question is whether the sum of \$2,200, which was paid to M'Donald by Burke for the stock of Durrell, should be distributed among the creditors of Durrell. I do not think that this

money should go to the creditors, for this reason:—Nivin and others became creditors of Durrell subsequently to the purchase of the stock and debts by M'Donald; therefore, in my opinion, they have no right to this money. I have been altogether at a loss to understand on what principle the majority of the Court are disposed to allow Nivin and other creditors to take possession of this money, when the transfer to M'Donald from M'Gibbon was anterior to their becoming creditors. I am of opinion that M'Donald acted in good faith in these transactions, and I have been unable to see any reason for making him pay the \$2,200 into Court. I have therefore to dissent from the judgment.

DRUMMOND, J. I must say that I had some doubts about pronouncing a judgment in the absence of Burke; but it appears to me, after reflection, that Burke has no interest whatever in the case, because no attempt has been made to assail his title. The object of the plaintiffs is simply to get from the hands of M'Donald the sum of \$2,200, which, as one of Durrell's creditors, he has appropriated to himself.

ATLWIN, J. I can only say, in the language made use of many years ago by Sir Alexander Stuart, this is a case of stinking fraud. I shall say nothing more.

Judgment confirmed, (except as to error in the amount, which was corrected) MONDELET, J., dissenting.

A. & W. Robertson, for the Appellant.

Popham, for the Respondents.

PRESIDENT ET SYNDICS DE LA COMMUNE DE LA SEIGNEURIE DE LA BAIE ST. ANTOINE, (defendants in the Court below,) Appelants; and LOZEAU ET VIE, (plaintiffs in the Court below,) Respondents.

Communal Land—Droit d'usage of timber.

Question as to the right of defendants to cut timber on certain communal land.

Held, that the *droit d'usage* (which is a proprietary right like a *usufruit*) de tous les arbres et bois de haute futaie on the *lisière de bois* in question, belonged to the plaintiff, and that the defendants merely possessed the *terrain ou fonds* of the land.

This was an appeal from a judgment of the Superior Court, rendered at Sorel, on the 19th

of October, 1861, condemning the defendants to pay £5 damages, for having cut timber on a certain *lisière de bois*.

BADGLEY, J. The Sieur Lefebvre, a former proprietor of the Seigniori of St. Antoine, commonly called La Baie du Fêbvre, made a grant to his tenants, sometime before 1724, of a tract of land along the shore of Lake St. Peter, for their common of pasturage, and after his decease, whilst his widow was in possession of the Seigniori, disputes arose between herself and the commoners as to its extent, and as to some other matters connected with it. These disputes were terminated in 1724, and the extent of the common was settled as being "tout le front qui se trouvera depuis les terres que le feu Sieur Lefebvre a acquies ci-devant du Sieur Courval, jusqu'à la Seigneurie Lussaudière ensemble le terrain étant depuis les concessions jusqu'au bord du Lac St. Pierre," including "la lisière de bois qui règne le long du Lac St. Pierre." From that time the record presents nothing to notice with reference to the common until 1822, and during that long interval the commoners used their common, whilst the Seigniors enjoyed, without interruption the *usage de bois* on the *lisière* above referred to. In 1822, the commoners, tenants of the Seigniori, petitioned the Legislature for their incorporation, for the purpose of administering and managing their communal property, and they were in consequence erected into a corporation, by the L. C. Act, 2 Geo. 4, cap. 10, which provided for the nomination of a chairman and trustees from amongst themselves, who were to regulate the affairs of the common, fix its boundaries, settle the number and description of cattle to be put to graze thereon, and the time for grazing, and which assured a right of common to each tenant. In 1824, an additional Act, 4 Geo. 4, was passed, which amended the previous one, and received the royal assent in May of that year. The powers of the chairman and trustees were thereby enlarged; they were authorized to fix the boundaries of the common absolutely, to contract, transact and conclude with all owners of land adjacent to or encroaching on the common, whether owners or Seigniors, upon terms to be mutually agreed upon, for the terminating of all disputes

respecting boundaries, to settle and fix limits, &c. Both Acts contained a special saving clause, whereby the rights of the Sovereign and of all persons were preserved, such only excepted as were particularly mentioned in the Acts. These special Acts had only reference to the common and commoners particularly, and to the purposes for which they were enacted, the regulation, management and use of the communal property, and the final settlement and definition of its limits; but neither in any way interfered with the acquired or vested rights of the Seigniors in the *usage de bois* in the *lisière de bois* above referred to, independently of the rights of the commoners in the *commune* itself. When the latter Act was passed in 1824, the Seigniority was subdivided amongst several proprietors, by purchases of separate portions of it, whereof the largest part belonged to the Demoiselles Lozeau, then minors, and *en tutelle* of their uncle Lozeau.

Whilst this subdivision existed, a deed of transaction, dated the 12th August, 1824, within three months after the coming into operation of the second Act of Parliament, was executed between these several co-proprietors and co-seigniors, of the one part, and the chairman and trustees representing the corporation, of the other part, wherein, after a statement that the old titles of the common were lost, the parties transacted and contracted together, they settled the extent and bounds of the common, as detailed in the deed, almost *in totidem verbis* the same as those given above as of 1724, and which detail was followed by the following express reservation:—

“que les dits seigneurs de-noms et qualités qu'ils y agissaient respectivement, se réservèrent très-expressément tous les arbres et bois de haute futaie seulement, qui se trouveront dans l'endroit communément appelé la *lisière de bois*, suivant ses sinuosités depuis les terres ci-devant et anciennement acquises par le dit feu Sieur Lefebvre du dit Sieur de Courval, à aller à la dite Seigneurie de Labussandière; le dit bois consistant en plaines, érables, et autres bois formant les sucreries, pour en jouir suivant leurs droits respectivement comme bon leur semblera, exceptés les arbres et bois qui se trouveront dans le quart de la dite

commune que les dits président et syndics concéderont ainsi qu'ils y sont autorisés; bien entendu toujours que le terrain ou fonds où se trouve le dit bois et arbres sus-réservés appartiendra à la dite commune.”

By this deed of transaction the parties thereto were severally maintained in their respective rights, the tenants retaining the property of the communal land, and the seigniors their reserved right and property in the *usage de bois*, and of the trees growing in the *lisière* within the common. Clearly the terms of this deed of transaction were not *ultra vires* of the chairman and trustees, but plainly within their statutory powers, to transact and conclude with the Seigniors; and their declaration of the Seigniors' reserved right of their *usage du bois*, in the *lisière*, which could not be withheld from them, was not a special *stipulation contractuelle*, or contract entered into by the chairman and trustees exorbitant of their powers.

The joint Seigniors subsequently executed a deed of partition amongst themselves, dated 20th June, 1826, for the division amongst them of the Seigniority, according to their respective rights and properties therein; and amongst the divisions thereby established, four were apportioned to the Misses Lozeau, whereof the first was at the N. E. extremity of the line of the common, and the fourth at the S. E. extremity, adjoining the dividing line of St. Antoine and Labussandière; their two other portions, and those of the other proprietors, lying promiscuously between the first and fourth portions. Their fourth lot is described as follows:—“toute la partie de la dite seigneurie qui se trouvera de front, à prendre d'un côté au nord-est à la part de seigneurie du dit Sieur Louis Manseau, à aller aboutir au sud-ouest à la Seigneurie de Labussandière, avec aussi la part dans la *lisière de bois* qui est et se trouve au-devant et vis-à-vis la susdite partie de seigneurie.” It is proper to state here that in the partition deed, to each particular division is appended, as to this fourth one, the same or an equivalent frontage portion of the *lisière de bois* as above.

It is upon this fourth allotment that the trespass is alleged to have been committed, and the damage complained of done. In order

to complete this partition, the several proprietors resolved to have their respective boundaries defined and laid down by an *arpentage* and survey, which was performed by a Provincial Surveyor, who drew not only the several division lines of the respective properties from each other, but also the front lines between them and the common, including the respective portions of the *lisière* in front of each property. These operations are shown in the surveys and *arpentages* for each individual property, and in the general mass of the whole, and also in the surveyors' *procès-verbaux*, all filed of record in this case. The proprietors assented to the operations by affixing their signatures to the several documents of the operations, and the corporation also acquiesced in them, their chairman and trustees also subscribing the same documents. These operations were completed in 1842.

The female plaintiff, by transactions and exchanges with her sister, became the sole owner of their joint allotments, as specified in the partition deed of 1826. She intermarried with the male plaintiff, but with stipulation of contractual *séparation de biens*.

From the record it appears that frequent depredations by individuals had been committed upon the trees growing and standing upon the *lisière de bois* in the plaintiff's allotments, which she did her best to stop by public notifications at the Church door to the tenants generally; but these depredations were made to assume unusual proportions at last by an assembly of the tenants, specially holden on the 29th November, 1868, and called for the express purpose, at which it was resolved by a majority as follows:—"que la Corporation est autorisée à faire bucher 300 ou 400 cordes de bois plus ou moins dans les limites de la dite commune durant la présente hiver, qui seront vendus par la dite Corporation pour le bien générale de tous les propriétaires de droit dans la dite commune;" and it was further resolved to contest "toutes oppositions qui pourraient être placées devant eux par les Seigneurs et autres à cet effet." The chairman of the Corporation, one Gouin, immediately set to work to carry out the resolution of the *habitants*, and put men to cut down the trees on the *lisière de bois*, and particularly a

considerable number upon the plaintiff's fourth allotment above described, the wood of which was by the chairman's directions removed and converted to the *bien général des propriétaires* in the said *lisière*, whereupon she instituted the present action against the Corporation, for £125 damages, for the wood cut and carried away.

The declaration sets out her possession for more than a year and day before this trespass, of the *droit d'usage de tous les arbres et bois de haute futaie* in the said *lisière*, the possession of the said *lisière de bois* by the seigniors for more than forty years, the terms and agreement of the deed of transaction of 12th August, 1824, between the seigniors and the Corporation, the special reservation therein of their right in all the trees in the *lisière*, the terms and effect of the said deed of partition, by the joint seigniors, the plaintiff's particular allotments of the seignior, and especially the fourth above described, with the portion of the *lisière* in front of it, her possession of that part of the *lisière* by herself and *outours* for more than forty years last past, and her present sole title thereto. She then charges the defendants with maliciously and knowingly committing the injury and damage complained of, with intent to damnify her, and her actual damage of £125, for which she prays their condemnation with costs.

The defendants have pleaded, by peremptory exception, that neither the plaintiff nor her *outours* ever had or could have any right of usage in the *lisière de bois*, which has always formed part of the common, and that neither she nor they possessed the *lisière* freely, peaceably and publicly; that the commoners have cut and carried away from the common for more than thirty years, *le bois d'eux nécessaire*; that the deed of transaction of the 12th August, 1824, was *ultra vires* of the Corporation, and did not nor could confer upon plaintiff and her *outours* any usage *de bois* or servitude in the trees and wood; that plaintiff never indicated her proprietary rights before the commissioner appointed under the statute to settle the rights of the commoners in the common, *ergo actio non* and annulment of deed of transaction.

Two special pleadings follow, one by each

party, plaintiff and defendants. The plaintiff, in reply to defendants' plea, specially alleges the feudal and seigniorial rights of herself and *autres* over the common, that the said commissioner had no statutory authority over her or her *autres*, and that any judgment rendered by him as against her or them, would be of no effect; and then denying finally the allegations of the peremptory exception in general. She concludes that as to her, if it be necessary, the commissioner's judgment should be set aside and her action maintained. The defendants on their part specially reply to her special answer, by demurring to the allegation of feudal right set up by her over the common, which they allege was an onerous not gratuitous grant; wherefore dismissal of her action. Both of these special pleadings are illegal, except as to her general denegation of the defendants' peremptory exception, and should have been dismissed.

A mass of oral testimony followed the pleadings, which may be summed up as follows: that plaintiff and her *autres* constantly, publicly and freely enjoyed the right of property and *usage de bois* over all the trees in the *lisière*; that depredations by individuals, some of whom were commoners, some not, were committed upon the trees and wood in contravention of her repeated and annual notifications against such *marcandage*; that the sugaries were *exploités* by the plaintiff or for her use and advantage; that the depredations were the acts of individuals, few in number out of the entire body of the *habitants intéressés*, and never by the latter in general, or as a body of commoners; that even these depredations were neither continuous nor public, and that neither as an unincorporated body, nor as a corporation, had her rights in the *lisière de bois* been interfered with by them previous to the date of the resolution to that effect of 29th November, 1858, under which her wood was cut down and converted to the use of the corporation; that upwards of fifty cords of wood were so taken, to her damage of upwards of \$50.

This oral testimony is accompanied by several documents filed in support of the plaintiff's pretensions, some whereof have been already adverted to, and amongst them she

has produced a copy of an ancient document, dated in 1724, by which the disputes between the *constables* and the then holder of the seigniority appear to have been settled between them. It has not been filed or declared upon as a title of property, nor is it necessary to consider it in that character, but it is available for the plaintiff as documentary evidence. It is the judgment of 1724, rendered by the Deputy of the *Intendant de Justice*, and established the extent and boundaries of the *commune* precisely as they have since continued, for the purpose of the commoners' pasturage, and, after making certain reservations of lesser importance to the Seigneur, concludes with this special reservation: "*lui reservons en outre tous les arbres étant en la susdite lisière de bois, pour en disposer par elle, ainsi qu'elle en jugera à propos.*" From that time the commoners' right in the common and the Seigneur's right in the *lisière de bois*, have been coincident and co-extensive, and it may not improperly be said, upon a fair examination of the whole case, that the plaintiff has *from that time*, shown a continuous and uninterrupted right and property, as well as possession of her *usage de bois*, down to the institution of her action, with the full and perfect acquiescence of the commoners in that right, through the deed of transaction of 1824, and the *arpentage* of 1842, in connection with the deed of partition of 1826, until the date of their adverse resolution of 1858, in which they impliedly admit the plaintiff's right, by deciding to contest it, and this for the first time. This continuity of right and of possession of itself constitutes in law a *véritable droit*, because the *droit d'usage de bois* is not a servitude, it is a proprietary right like a usufruct. The authors characterise it as a *droit immobilier, un démembrement* of the real property. "*C'est une séparation perpétuelle du droit de jouissance dans les arbres de celui de la propriété,*" and rests upon a proprietary right acquiesced in and acknowledged by the Corporation since its existence as such in 1822, and sustained by an uninterrupted possession *non desertée ou abandonnée* by the plaintiff or her *autres* during the interval from that year.

The right and property of the defendants

in the communal land, including the land on which the *lisière de bois* is standing, are not questioned by the plaintiff; but they have shown no title to those trees in question, and the trespasses and depredations committed by a few marauders upon the wood in the *lisière* before the date of the resolution of 1858, cannot acquire to the Corporation a right over the plaintiff's property which the Corporation had not previously had, nor justify the claim to prescriptive exclusion of the plaintiff from her *usage de bois*. The defendants have shown none of the legal ingredients required to establish prescription in their own favour, or to divest the plaintiff. Having then no title in themselves, and no possessory or prescriptive right, the act of the defendants complained of by the plaintiff was unjustifiable, and their peremptory exception was therefore properly dismissed, by the judgment of the Court below, which also properly maintained the plaintiff's action. This Court confirms that judgment with costs, and would have been disposed to have extended the amount of the damages thereby awarded, by giving exemplary damages to put a stop to such outrageous proceedings; but taking into consideration that the costs will be heavy, the original judgment will stand unchanged, and we therefore confirm the judgment as it is, with costs against defendants.

DRUMMOND, J. It is proper to say that the Court does not rely upon the old judgment referred to by Mr. Justice Badgley. There is no proof that it is an *ancien document*. I do not look upon it as of any authority whatever.

AYLWIN, and MONDELET, JJ., concurred.

Judgment confirmed.

Olivier & Armstrong, for the Appellants.

Lafrenaye & Bruneau, for the Respondents.

ANGERS, (plaintiff in the Court below,) Appellant; and ERMATINGER ET AL., (defendants in the Court below,) Respondents.

Promissory Note—Payment by Goods.

To an action on a note, Thomas, one of the endorsers, pleaded payment. It appeared that he had furnished the plaintiff with groceries, the accounts for which were stated in the pass-book to have been "settled," but it did not appear that any money passed. The

plaintiff having given unsatisfactory replies when examined as to his payments, it was held that the price of the goods must be deducted from the note.

This was an appeal from a judgment of the Circuit Court, rendered at Montreal, by Monk, J., on the 30th of December, 1865, by which the plaintiff's claim of \$129 was reduced to \$24.

BADGLEY, J. This action is upon a promissory note, dated 21st February, 1861, made by one of the defendants in favour of the other, by him endorsed to one Malhiot, and by the latter endorsed to the plaintiff, the holder. It was protested in May following, and was for \$135.

The plea to the action is the payment of the note by the payee, who was a grocer at the time of the transactions between the parties, by cash paid and by groceries supplied to the plaintiff. The cash payment was \$35, and the amount of goods supplied was \$82 88. The plaintiff, by his replication, admitted for the first time the cash payment, which had been omitted to be credited. He likewise admitted his purchase of the groceries supplied to him, as charged, for \$82 88; but alleged positively and expressly that he had paid the amount in cash to Thomas, and that his cash receipts were to be found in the pass-book filed by him, in which were entered in detail all his purchases, and also his payments, which were receipted therein by Thomas, under his signature.

The only question in the case, then, taking the plaintiff's admission of the payment of \$35, and of the amount charged for his purchases, was the actual payment of the latter by him, and this issue rests upon him to prove in his own favour.

The facts of record are few and simple. Whilst the plaintiff held this note, dated in February, 1861, and protested in May following, and being then the creditor of the defendants for the amount, he commenced to take from Thomas, one of them, a trading grocer, his supply of groceries. His first purchase was on the 11th of December, 1861. On the 24th of the same month, he received from Thomas \$35 in cash on account of the note, and continued to supply himself from Thomas' store until the 28th of March, 1863, when his gross purchases amounted to \$82 88. He

used a pass book in which the entire purchases were entered at length, and which he produces in support and as evidence of their actual payment by him. The book contains settlements at intervals down to the close of the account, and these are signed by Thomas. In denial of the plaintiff's payments, and in proof that these were mere settlements to be credited on the note, the evidence consists, first, of Tooke, a clerk of Thomas during the time, who was cognizant of the purchases; and, secondly, of the plaintiff himself. The clerk says that no money passed, that he was so told by Thomas, which, of course, is not evidence; but he adds, and swears positively, that no entries of such payments appear in the books, where, doubtless, they would have been found had money really been paid. The purchase of goods ceased on the 28th of March, 1863; the action was instituted in May, 1865, and the *enquête* was taken not long after. The plaintiff was particularly examined with reference to these cash payments alleged to have been made by him, and his long and searching examination has disclosed a considerable amount of equivocation, and a seeming desire not to disclose all the particulars within his knowledge. He is a bill-broker and discounteer, and a man of business, but he can give no information in what manner these alleged cash payments were made, the circumstances of the payments, the kind of money he paid in, or how they were made. He affirms that he cannot recollect any of these particulars, but that they must have been made, because the pass-book shows the receipts. Such testimony coming from the party plaintiff, himself interested to support his own case, is far from satisfactory, and raises an apprehension that such equivocations cover reticences against the fact. When it is considered that the grocer's books show no such entry, that no irregularity is imputed to them, that the plaintiff was a business man, well aware of his business transactions, because he refers to his previous business transactions with Malhiot, from whom he received this note; that no long interval of time elapsed after the grocery transactions until the time of his examination, in which his recollections could have been hazed; that he

omitted to credit the \$35 in cash paid within a few days of his beginning to take these groceries; that he was all along the holder of the note, and the creditor of the grocer during the entire period in which he was supplied by the latter with groceries; that at no time did he apply for payment of the note until the institution of his action in May, 1865, whilst during this time he, the creditor, was actually paying cash out of his pocket for goods, which the creditor conceived he was giving on account of the amount of the note,—such a case is inconceivable in a business, or even a moderately intelligent man; and coupling his own unsatisfactory evidence in support of his positive assertion of his actual payments in money, shown by the alleged receipts in the pass-book, but which, except in one instance only, are entered, not under the form of "received payment," but simply "settled," we are not disposed to interfere with the judgment appealed from, and therefore confirm it with costs of this Court.

MONDELET, J., dissenting. In my opinion it is satisfactorily proved that the plaintiff paid for the goods obtained from Thomas. It is not extraordinary that after the lapse of several years, the plaintiff should not be able to give answers respecting the details of these transactions. I think, therefore, the judgment should be reversed.

DRUMMOND, J. I must admit that in concurring in the judgment of the majority, I may be concurring in an act of injustice, because the evidence is not satisfactory on one side or the other. Tooke, the clerk of Thomas, stated that he was certain that the plaintiff never paid any money whatever to Thomas for the goods; but on cross-examination he admitted that he never was present when the receipts were given to the plaintiff; that he knew the receipts were given on account of the note, because Mr. Thomas told him so. He thus leaves us in doubt. The plaintiff might have dispelled that doubt if he had answered like a straightforward man, but his answers are most decidedly unsatisfactory. He says that he has forgotten all about his payments, except that they were made in money. This was exactly the case in which to propose the *serment supplétoire*, and I would have been dis

posed to order the record to be sent back for this purpose. Where a judge is in doubt as to the justice of a judgment, it seems to me that he should confirm it, especially in a case like this, where the judgment tends to liberate a party from an obligation. I therefore concur in the judgment.

AYLWIN, J. This Court has never ordered a reference to the *serment judiciaire*, and therefore I should be extremely unwilling to alter the practice. However, I will say this, that it was highly desirable that there should have been a reference to the *serment judiciaire*, more particularly as in a recent statute there is a clause which authorizes the judges of the other Court to order the *serment judiciaire*, which power formerly did not exist in commercial cases.

Judgment confirmed, MONDELET, J., dissenting.

Lacot & Laurier, for the Appellants.

Perkins & Stephens, for the Respondents.

Dec. 1, 2, 4, 1866.

FERRIER, (opposant in the Court below,) Appellant, and DILLON, (plaintiff in the Court below,) Respondent.

Practice—Delay in returning Writ of Appeal.

Held, that where the delay in returning a writ of appeal is caused by the neglect of the prothonotary, and not of the party appellant, the latter may nevertheless be condemned to pay the costs of the respondent's motion to have the appeal dismissed, his recourse being by direct action against the prothonotary.

Mr. Perkins moved on behalf of the respondent, that inasmuch as the appellant had failed and neglected to return the writ of appeal with the record from the Superior Court, and the return day had passed without the appellant having taken any proceedings, the appeal be declared abandoned and deserted.

This motion was served upon the appellant's attorneys on the 19th of November, 1866, and made in Court on the 1st December following. About this time the record was returned before the Court, and the question of costs on the motion alone remained.

Mr. Cross, Q. C., for the appellant, submitted an affidavit of his partner, A. H. Lunn, showing that he had repeatedly applied to the

Prothonotary to return the writ of appeal before the Court, with the record and proceedings, and had notified him that a motion had been made to dismiss the appeal, on account of the delay in doing so. The delay was caused solely by the neglect of the Prothonotary, and no costs should be allowed on the motion.

Judgment was given Dec. 4.

AYLWIN, J. In this case we are unfortunately under the necessity of giving the costs against the appellant.

Mr. Cross. But against the Prothonotary, not against the party?

AYLWIN, J. How can we condemn the Prothonotary, when he has not been heard before us?

Mr. Cross. But the party should not suffer for the neglect of the Prothonotary. It has not been the practice to make the party liable for costs in such cases. At least the Prothonotary should have been served with a copy of the motion.

AYLWIN, J. We have nothing to do with the Prothonotary here. It was not necessary that he should have been served with the motion. Your remedy is by a direct action against him, and I am desirous of seeing the proper remedy taken, as the principle is of the highest importance.

DRUMMOND, BADGLEY, and MONDELET, JJ., concurred in the judgment.

The order of the Court was that the respondent take nothing by the motion, save and except as to the costs, which the appellant was condemned to pay to the respondent.

Cross & Lunn, for the Appellant.

Perkins & Stephens, for the Respondent.

Dec. 4, 7.

LES DAMES RELIGIEUSES HOSPITALIERES DE ST. JOSEPH DE L'HOTEL DIEU DE MONTREAL, (defendants in the Court below,) Appellants; and CORPORATION VILLAGE DE ST. JEAN BAPTISTE, (plaintiffs in the Court below,) Respondents.

Appeal—Municipal Act—Amending Act, 24 Vict. c. 29.

Held, that there is no appeal from decisions of the Superior and Circuit Courts, under the Act 24 Vict. c. 29, amending the Lower Canada Consolidated Municipal Act, the

amending statute being an integral part of the original Act.

M. Ouimet, for the respondents, moved to reject the appeal taken from a judgment rendered by the Superior Court, on the 29th Sept. 1866. The action was brought, for the recovery of taxes and assessments due to the Municipality, under the Lower Canada Consolidated Municipal Act, C. S. L. C. cap. 24, and under this act the right of appeal from decisions rendered by virtue of it is taken away. In *Groulx v. Corporation de la Paroisse de St. Laurent*, (10 Jurist 75, 2 L. C. L. J. 11,) it was held that there is no appeal from a judgment under the Municipal Act. That decision applies here.

M. Roy, Q. C., for the appellants. The action is not brought under the Municipal Act of 1860, but under the amending statute, 24 Vic. c. 29. This makes no reference to there being no appeal from decisions under it. The right of appeal must be assumed, unless expressly taken away. The provision in the original Act is not applicable to actions under the amending statute.

M. Ouimet, in reply. The amending Act is an integral part of the original statute, and the provision in the original Act, taking away the right of appeal, applies with equal force to decisions under the amending Act.

Judgment was rendered Dec. 7.

BADGLEY, J. The Court is of opinion that the motion made by the respondents must be granted. The amending statute, after making certain amendments to the original act, enacts (Sec. 30) that the amending act shall be read together with the original act, and there is nothing in it which does away with the exclusion of the right of appeal contained in the original act. Taking, therefore, the two acts together, inasmuch as this Court has no jurisdiction with respect to any judgment of the Circuit or Superior Court rendered in virtue of the original act, so it can have none with respect to judgments under the amending act.

MORDELL, J. The amendment must be considered as an integral part of the original act.

AYLWIE, and *DRUMMOND*, JJ., concurred.

Motion granted.

Roy & Joseph, for the Appellants.

Moreau & Ouimet, for the Respondents.

JONES ET AL., Appellants; and LEMOINE, Respondent.

Practice—Appeal to Privy Council.

Held, that the delay of six months fixed by Consol. Stat. L. C. cap. 77, sec. 53, during which execution on the judgment is suspended, is not absolute, but directory only, and the Court of Appeal may refuse to order the record to be remitted to the Court below to the intent that execution may be sued out, where the appellant has lodged his appeal before the Privy Council soon after the expiration of the six months.

Mr. Barnard, for the respondent, moved that inasmuch as the certificate of the Clerk of the Privy Council, stating that an appeal to the Privy Council of Her Majesty has been instituted, and that proceedings have been adopted on the appeal, was not filed within the delay required by law, and inasmuch as the Deputy Clerk of this Court refuses to transmit the record in this cause to the Court of first instance, he be enjoined to so transmit it forthwith. The object of the motion was to enable the respondent to take execution. The appellant has six months, running from the allowance of the appeal, and the certificate of the Clerk of the Privy Council should be received here within that time. The certificate in this instance, moreover, is not in proper form. So far from stating that proceedings have been had on the appeal, it states that no proceedings have been taken on the appeal, and that the appeal will be dismissed if no proceedings are taken within three months.

BADGLEY, J. The delay ran from the 9th of March, date of rendering judgment, and expired on the 9th of September. The certificate is dated on the 13th, four days after. In the face of this, I will not interfere to prevent the appellants from proceeding.

DRUMMOND, J. The certificate should be filed here within the six months. I think, however, we have a discretionary power, and that we should not interfere if the parties are pushing on the appeal.

Mr. Barnard. The delay is positive and absolute. If the certificate is not filed here within the six months, it is no certificate, and

cannot stop my proceedings. The law was made for the express purpose of putting an end to vexatious delays in the prosecution of appeals before the Privy Council. It is well known that appeals are frequently instituted for the purpose of obtaining delay. The rule in this instance should be as strictly enforced as the fifteen days' rule for appeals from the Circuit Court, which has been held to be absolute.

BADGLEY, J. We cannot count minutes in this manner. The appellants are only three or four days behind time.

DRUMMOND, J. I think the law is decidedly in favour of Mr. Barnard's pretensions, but under the circumstances, as the appellants have taken steps to prosecute the appeal, and must proceed within three months, I think the Court may exercise a discretion.

AYLWIN, J. I have entertained no doubt on this point. The motion is rejected.

DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

Moreau, Ousimet & Chapleau, for the Appellants.

Barnard, for the Respondent.

Dec. 6th, 1866.

THE QUEEN v. PAXTON.

Reservation of Questions by Criminal Courts
—C. S. L. C. Cap. 77, Sec. 57.

Held, that under C. S. L. C. Cap. 77, Sec. 57, no question of law which has arisen on the trial, can be reserved, unless there has been a conviction.

This was a case reserved by *Drummond, J.*, at the September term of the Court of Queen's Bench, sitting on the Crown side. The prisoner, John Paxton, formerly resident in Montreal, had been surrendered by the United States Government, under the Extradition Treaty, on a charge of forgery. He was indicted, at the September term, for feloniously uttering a forged promissory note. His counsel, Mr. *Devlin*, filed a plea that the prisoner, having been extradited on a charge of forgery, could not be tried on any other charge. The Crown demurred to this special plea, and the trial was not proceeded with till the opinion of the full Court should have been taken.

Mr. *Carter*, Q. C., appeared for the Crown,

and was proceeding to support the demurrer.

AYLWIN, J. Has there been any trial in this case?

Mr. *Carter*. Not upon this indictment.

MONDELET, J. If there has been no trial, how was the case reserved?

Mr. *Carter*. The reservation was the act of the Court itself, and the counsel on both sides were anxious for a decision on the point.

MONDELET, J. But the statute is positive. Sec. 57, "*When any person has been convicted of any treason, felony or misdemeanour, at any criminal term of the said Court of Queen's Bench, &c., the Court before which the case has been tried, may, in its discretion, reserve any question of law which has arisen on the trial,*" &c. There can be no reservation unless there has been a conviction. I remember that the late Chief Justice Sir L. *Lafontaine* refused to hear a case which I had reserved before trial. The Court has no jurisdiction.

DRUMMOND, J. I did not look at the statute at the time, and the question was not raised by counsel; but it seems that I was premature in my reservation of the case.

Mr. *Kerr*, for the prisoner, referred to the English practice under a similar statute.

DRUMMOND, J. Can you find any case under the English law, in which a point was reserved before conviction? If so, I would be disposed to follow it, because it is extremely inconvenient that a party should be compelled to proceed to trial, when the question is whether there should be a trial or not.

Mr. *Kerr* said he had not anticipated any difficulty on this point, and had not looked into the authorities.

The following order was then made by the Court, (AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ.):—Seeing that no conviction has been had in this cause, and that therefore the Court now here has no jurisdiction in the premises, it is ordered that the case reserved by the Court of Queen's Bench, sitting on the Crown side at Montreal, and referred to this Court, sitting in error in criminal cases, be returned and remitted to the said Court, to the end that such other proceedings be there had as to law and justice appertain.

Carter, Q. C., for the Crown.

Kerr (representing Mr. Devlin), for the prisoner.

[The same order was made on the same day in the case of *Regina v. Dunlop*, in which a question of law had also been reserved by *Drummond, J.*, before trial.]

SUPERIOR COURT.

LEMOINE v. LIONAIS.

June 27th, 1866.

Action to rescind Deed of Sale and Transfer.

Held, that the Court will not proceed to adjudicate upon a demand to annul a deed of sale, where persons interested in such deed have not been made parties to the suit.

That although open possession for a period slightly falling short of the term necessary for prescription is not a legal ground of defence to an action to rescind the deed of sale under which the property has been held, yet a presumption of good faith on the part of the possessor arises from it, which may be regarded in the decision of the case.

That where the sale is made by husband and wife, a *contre lettre*, passed after the sale, between the purchaser and the husband only, which does not contain anything injurious to the interests of the wife, is not illegal.

That a deed of sale cannot be rescinded on the ground of *lésion*, where the amount of the consideration, and the actual value of the property at the time of the execution of the deed, are not fully established.

The facts of this case which has been in litigation for ten years, are set forth in the judgment.

MONK, J. This is an action brought to set aside a sale of certain property, on the 30th October, 1846, from Mr. and Mad. Regnier to Mr. Lionais, the defendant. The plaintiff sues as the *cessionnaire* of Mad. Regnier's rights. He waited till the 29th October, 1856, ten years *less one day* after the sale, and then brought his action. In reading over the allegations of the pleadings, it is painful to contemplate the tone and the force of the language employed, by which fraud, force and violence of every description are charged against Mr. Lionais. It is alleged that he conspired with Mr. Regnier, a profligate husband, to use every means for the purpose of stripping the wife of the latter of all she possessed. It is painful to see a fellow-citizen accused of such monstrous conduct.

The first question is whether the authorization by Mr. Regnier of his wife in the deed of 1846 was void or not. On this question I have, after due examination, come to the conclusion that the authorization given by Mr. Regnier to his wife was perfectly legal. The next question is whether there was any fraud in the deed. I have looked into this question with a great deal of care, and I find no evidence whatever of fraud except in the evidence of Chamilly De Lorimier, Mad. Regnier's son-in-law. Mr. Lionais has been subjected to a cross-examination, unparalleled in my experience for its length and minuteness, going, it may almost be said, into all the incidents of his lifetime; but there is very little in this that has anything to do with the case. As to the sale itself, it is certain that Mr. Lionais, who held certain claims against Mad. Regnier, pressed for payment. At this time Madame Regnier was a person of very considerable means. Though she owed a good deal of money, she had abundant means to pay her debts. She possessed valuable properties, and a large number of *baillieur de fonds* claims. Why, then, did she not pay Mr. Lionais? Her son-in-law, Chamilly De Lorimier, a lawyer of long standing, and presumably of mature experience, stated the reason to be that her husband would not authorize her to take any steps to pay Mr. Lionais. Could she not have been authorized by a judge upon a summary petition? Mr. De Lorimier was aware of this, he said, but he did not want to interfere. Mr. Lionais, then, desirous of being paid, took some preliminary steps by *saisie-arrest*, &c., and this, it is said, was coercion. Then there were *pour parlers* and interviews extending over three or four months. Finally the sale in question from Mr. and Madame Regnier to Mr. Lionais took place. At this time Mr. Beaudry acted as the legal adviser of Mad. Regnier, but he and Mr. De Lorimier state that she agreed to the sale, because she wanted Mr. Lionais to protect her against her husband! Steps were taken to prepare the deed of 1846, now sought to be set aside. Mr. Beaudry, experienced in business and acquainted with law, as representing Mad. Regnier, drew up the deed, and Madame Regnier had it in her possession during several days. Mr.

De Lorimier knew all about the matter, and, besides all this, they took the advice of two of the foremost men in the profession. Now, however, it is pretended that they consulted these gentlemen for the purpose of letting them see how skilfully Mr. Lionais was winding his conspiracy around Mad. Regnier. This is a most extraordinary pretension, and, in fact, utterly absurd. I must say that from the beginning to the end of Chamilly De Lorimier's testimony, it bears on the face of it, the stamp, I will not say of falsehood, but of moral weakness, and contains something so unutterably absurd, that I cannot attach any weight to it. The consideration for the sale, in which Mr. Regnier intervened and authorized his wife, was estimated by the defendant at £4,500. Mr. Lionais undertook to pay £2,000, and also to pay certain debts mentioned in a schedule. It is alleged that this list was a deception, fabricated by Mr. Lionais. But there is no evidence whatever to lead me to this conclusion.

The next point is the *contre lettre* between Mr. Regnier and Mr. Lionais on the 3rd Nov., 1846, three days after the sale. It is said that this was fraudulent; but if Mr. Regnier was interested in the sale, he had a perfect right to enter into a *contre lettre* with Mr. Lionais, provided it contained no stipulation militating in any way against the rights of Mad. Regnier. The document must therefore stand. Thus the grounds of fraud and violence urged for rescinding the sale must fall to the ground.

There is a plea of prescription of ten years. This was rightly dismissed, because, instead of ten years, ten years less one day elapsed. From 1846 to 1854 Mr. Lionais was allowed to live on this property, and to expend large sums in improving it. Then in 1854, Mad. Regnier sold to Mr. Lemoine her rights to have the deed of 1846 set aside. It seems very extraordinary that her advisers, legal and business men, should have allowed her to wait so long, and, in an equitable point of view, this inclines the court to think that they had some doubt about the matter—that they were not sure there was fraud in the sale. Here was Mr. Lionais living like a prince upon this property, and Madame Regnier, as alleged, starving, and finally dying of a broken heart, and

for eight years, they never seemed to think Mr. Lionais to be a usurper! This was not human nature—not even Chamilly De Lorimier's nature. Even his lethargic temperament would have been roused up. It is very strange, indeed, that the parties thus allowed the moss of age to grow over their rights, and that then Mr. Lemoine, the *cessionnaire*, waited two years more, and, just as the clock was about to strike, and the ten years to expire, he suddenly woke up at the last moment and brought the present action. Although the legal prescription has not been acquired, I have no hesitation in saying that the facts I have mentioned have had great weight with me.

The next point is whether this lady failed to ratify the deed of 1846. Time has almost ratified it for her, but she also took steps for this purpose when she transferred the £2000, due her under it, to J. Bte. Lionais in March, 1853. Supposing this transfer effected by fraud, there is no evidence to satisfy the Court that it vitiated the ratification. But there is more in this case touching the fraud. Mr. Lionais, after he had made the purchase, seems to have been dissatisfied with it, and called upon Mr. and Mad. Regnier to take back the property—the very property which it is pretended he got into his possession by conspiracy with the profligate husband. I have to look at this declaration of his wish, and see whether he was sincere in it, or whether, as the plaintiff pretends, he merely did this to cover up a transaction which he was afraid was not all right. I cannot look into hidden motives. Mr. Lionais may possibly be a man of such consummate rascality as to act thus, but there is no evidence to warrant such a conclusion. But he did more; he brought an action to have the deed set aside, and invoked as a nullity that Madame Regnier, in becoming a party to the deed of sale, neglected to comply with the provisions of the law, which required that a married woman, who wished to dispose of her immoveable property, should first appear before a judge and state that she freely consented to the sale of the property. Mr. and Mad. Regnier appeared in the suit, and allowed the cause to stand. In the meantime a law (12 Vic., Cap. 48) was passed, which de-

clared deeds which had been executed without this formality, to be perfectly valid, and thus Mr. Lionais' cause of action fell to the ground, and he discontinued his action. The Court now comes to the question of *lesion*. On this point, the two questions are, what was the consideration, and what was the value of the property when it was sold? The consideration was estimated at £4,500; but, owing to the length of time that has elapsed, it is impossible for the Court to form any definite conclusion from the evidence as to the value of the property when it was sold. Here again it is the fault of the plaintiff that so long a period has elapsed. It is impossible, therefore, to set the deed aside on the ground of *lesion*. Next, it is important to look at the consideration given by Mr. Lemoine. He purchased Mad. Regnier's rights to have the deed set aside, for £1075, eight years after the execution of the deed. This shows that he did not look upon the speculation as a very sure one. On the merits, then, the action must be dismissed. There are also technical difficulties which would have required to be removed, had the Court taken a different view of the case. The first is, that there are three or four parties interested in the cause who have not been brought into the record. The second is, that the heirs of Mr. Regnier have not been represented. In this particular the Court has an important piece of evidence. Mr. Regnier transferred his rights under the deed of 1846 to one of the most honorable men in the country, of the highest character and position!! Surely, then, there could have been no fraud connected with this deed, or this gentleman would not have had anything to do with the transaction!! There is, lastly, a plea of *droits litigieux*. There cannot be the slightest doubt that Mr. Lemoine, in purchasing Mad. Regnier's rights to have this deed set aside, purchased a *droit litigieux*. Without wishing to stigmatize the transaction, I must state that this is beyond any doubt. As, however, the Court has decided, on the merits, that the plaintiff really acquired no rights at all, Mad. Regnier having herself no right to have the deed set aside, it is unnecessary by the judgment to pronounce upon the plea of *droits litigieux*.

The following is the recorded judgment.

"The Court having heard, &c., without adjudicating upon the defendants' plea of litigious rights (*droits litigieux*), save and except in so far as the same is adjudged upon and disposed of by the following judgment upon the merits of this cause; and proceeding to render its decision upon the law and the facts as presented for deliberation and final judgment thereon.

Considering that the plaintiff hath not by his action assigned and brought into the record of his demand, all the parties interested in the issue and decision of this cause; and particularly among others, that he has not assigned and brought into the case, the heirs or representatives of Madame Monarque, mentioned in the deed of sale and cession of rights of the 30th of October, 1846, as a party to the same, in whose favour the payment of a life-rent was stipulated in and by the said deed; Jean Baptiste Lionais and Dame Henriette Moreau, wife of the defendant, and separated from him as to property, both of whom have become and are pecuniarily interested in the result of this suit, in the manner and form, and to the extent shown and stated in the pleadings and testimony adduced; the Seigniors of the Fief LaGauchetière and the Seigniors of the Island of Montreal, parties interested in certain sums for the commutation of the lands in question in this cause; and, lastly, the heirs or representatives of the late Auguste Regnier, co-vendor with his wife, Marguerite Roy, in the deed of sale of the 30th of October, 1846.

Seeing that ten years, less one day, were allowed to elapse between the date and execution of the deed of sale to the defendant last above mentioned, and the institution of the present action; and that the plaintiff, after he had acquired the alleged rights of Madame Regnier to have the deed of the 30th of October, 1846, annulled and set aside on the grounds of fraud and *lesion*, allowed more than two years to elapse without taking legal proceedings to that effect against the said defendant, who for a period of ten years, less one day, had remained in peaceful and undisturbed possession of the property in question in this cause, and hath during that period in good faith made great, extensive and valuable improvements and ameliorations to and upon the

same; and although such a possession be not a legal ground of defence to the present action, yet from it results a presumption of good faith on the part of the defendant, which cannot be disregarded in the decision of this cause; and in view of the equity of the case, this fact can in no wise aid the pretensions of the plaintiff.

Considering that by the terms and stipulations of the contract of marriage between Auguste Regnier and Marguerite Roy, executed at Montreal by and before notaries, the 6th of July, 1835, Auguste Regnier and Marguerite Roy, future husband and wife, notwithstanding the express exclusion of the legal community, did agree to and with each other, that there should be a conventional and partial community, (*une communauté conventionnelle et partielle*), existing between them, and that this stipulation, in all respects legal and recognized by law, results from the following clause in the aforesaid contract of marriage:—" *Cependant les bénéfices et augmentations appartiendront de plein droit par moitié aux dits futurs époux, et leur sortiront nature de propre, et aux leurs de leur estoc côté et ligne.*"

Seeing that by the contract of marriage aforesaid, between the parties aforesaid, there is to be found no stipulation whereby the future husband and wife should enjoy and appropriate the rents, issues and revenues of their respective properties separate and apart, and consequently that such rents, issues and revenues fall into and become a part of the aforesaid conventional and partial community; and considering that on the 13th of July, 1835, Auguste Regnier and Marguerite Roy were married under the operation of the above recited clause in their contract of marriage; and whereas, in and by a certain deed of sale and transfer, executed before notaries, on the 18th of April, 1838, one Chamilly De Lorimier, and his wife, Christine Rachel Cadieux, sold and transferred to Auguste Regnier and to Marguerite Roy, his wife, all the rights and claims they might have against one Léon Pinsonneault, in regard to certain sales of real estate, which three of the children of the late Pierre Cadieux had before that time made to Pinsonneault, of their share and shares in the half of the Cadieux farm, and which is in question

in this cause; which rights and claims had previously been transferred to De Lorimier and wife, the other heirs Cadieux.

And whereas, under and by virtue of the last mentioned deed of sale, the aforesaid Auguste Regnier and his wife became proprietors of the consideration money and the balances thereon of the sales, made by the heirs Cadieux to Pinsonneault, and thereby acquired the right to claim from Pinsonneault the price of three-fourths of the Cadieux farm, by them sold as above mentioned to Pinsonneault, and also the right to enforce a recision of these sales in default of payment of the purchase money by Pinsonneault.

Seeing that the purchase money on these several sales thus acquired by Auguste Regnier and his wife, from Chamilly De Lorimier and his wife Christine Rachel Cadieux, constituted an increase and augmentation of their property (*firent des bénéfices et augmentations*) in the terms of their contract of marriage, and were made and realized during their marriage, and as such fell into the conventional and partial community existing between Regnier and his wife.

Considering that by the deed of sale and transfer of the 30th of October, 1846, executed before notaries, and whereof the recision is sought by the present action, on the ground of fraud and *lésion*, Regnier and his wife sold to Lionais, the defendant, among other properties, real and personal, the aforesaid balances of consideration money by them acquired from Chamilly De Lorimier and wife, and which balances formed a part of the conventional and partial community existing between Regnier and wife, and of which Regnier, as her husband, was the chief and head.

Seeing that by the deed of sale and transfer of the 30th of October, 1846, Regnier and wife sold to the defendant certain real estate, which had fallen into and become part of the conventional and partial community existing between Regnier and his wife.

Considering therefore that the deed of sale of the 30th October, 1846, was made by Regnier and his wife to Lionais not only as persons separated as to property, but also as *communs en biens*, under the partial commu-

nity existing between them, and to the extent of that community.

And whereas the *contre lettre* of the 30th October, 1846, entered into between Lionais and Madame Regnier, was so made and executed to settle and determine definitively the amount and share of purchase money, payable to Madame Regnier by Lionais, under and by virtue of the deed of sale of the 30th October, 1846, which was fixed in and by the said *contre lettre*, at the sum of £4,500.

Seeing that the *contre lettre* of the 3rd of November, 1846, entered into by and between Lionais and Auguste Regnier, had for its object to settle and determine, as far as possible, the share and amount which should become payable to Regnier for his interest in the properties, credits and rights sold and transferred by the deed of sale of the 30th October, 1846, but that from the nature of the stipulations, and the then undetermined and eventual character of the consideration, it was and is difficult, if not impossible, to determine what amount Lionais undertook and promised to pay Regnier.

Considering that the *contre lettre* of the 3rd of November, 1846, between Regnier and Lionais, for the reasons above assigned, was not illegal, or injurious to Madame Regnier's interests, nor did the same in any way vitiate, or render illegal, void or voidable in law, the authorization by Regnier of his wife in the deed of sale of the 30th of October, 1846.

Seeing, moreover, that it does not result from the evidence adduced by the plaintiff, that the defendant, Lionais, either alone or in concert and confederacy with others, practised or employed any menaces, threats or violence, in order to obtain the consent of Madame Regnier to the deed of sale and transfer to Lionais, of the 30th October, 1846.

Seeing that the plaintiff hath not established, by legal and sufficient evidence, any acts of fraud, deception or surprise, alleged and pretended in and by his declaration, to have been employed or practised by Lionais, in reference to the deed of sale and transfer of the 30th October, 1846, but on the contrary the facts proved establish that the parties to that deed, and particularly Madame Regnier and her husband, acted freely and without

coercion and restraint, and with full knowledge of the facts, and that in so far as regards the defendant Lionais, there is no proof of surprise or coercion practised by him.

And seeing, moreover, that Madame Regnier entered into and executed the said deed, after full deliberation, was aided by the advice of relatives, and proceeded upon the counsel and advice of eminent lawyers of great experience, and holding a high character and position in their profession.

Seeing, besides, that it clearly results from the testimony adduced, that the defendant Lionais, by divers acts and proceedings subsequent to the date of the deed of sale of the 30th Oct., 1846, and which deed the plaintiff now seeks, by the present action, to set aside, and cause to be rescinded, upon the grounds of fraud and *lesion*, had manifested his desire that the said Regnier and wife should voluntarily annul and rescind the said deed, and retake the property to him sold and transferred by said deed, and that such re-transfer should be made, as proved by the express offers of the said Lionais, upon terms at once liberal and easy for the said Regnier and wife.

Considering that Madame Regnier, with the consent and legal approbation of her husband, on several occasions and by various deeds, subsequently ratified and confirmed the said deed of sale of the 30th Oct., 1846, and particularly by the deed of the 26th June, 1849, nearly three years after the execution of the said deed, whereby Madame Regnier granted to the defendant, Lionais, a considerable delay for the payment of the sum of £2000, part of the purchase money due and payable to her, under and by virtue of the deed of sale of the 30th October, 1846, and also by the deed of transfer dated 31st March, 1853, nearly seven years after the execution of the deed of 30th Oct., 1846, whereby Madame Regnier transferred the aforesaid sum of £2000 to one Jean Baptiste Lionais.

Considering that it is not competent for this Court, in view of the parties to the present action, of those interested, but who are not parties to the same, to enquire into and adjudicate upon the legal effect and validity of acts in which third parties, but who are not impleaded in this cause, have or have had any

pecuniary interest or liability.

And whereas, in addition to fraud, violence and surprise employed by Lionais in obtaining the sale and transfer to him of the 30th Oct., 1846, it is alleged and contended, that the defendant, Lionais, acquired the properties enumerated and described in the deed of 30th Oct., 1846, for a price less by one-half of its real value; that he was guilty of a fraudulent deception as to the price and consideration to be paid for said property, i. e. *Usion* against Regnier and wife, the Court, after careful consideration of the evidence adduced on the part of the plaintiff and defendant, which testimony is of the most contradictory and conflicting character as to the value, on the 30th Oct., 1846, of the property sold to Lionais; and after mature reflection upon the nature of the credits transferred, doth declare and adjudge that the alleged *Usion* is not proved, and that the deed of sale of 30th Oct., 1846, cannot be legally rescinded and annulled, upon the proof adduced in support of this pretension of the plaintiff, inasmuch as it is manifest that the neglected and abandoned condition of the real estate at the time of the aforesaid sale, the unforeseen and advantageous changes which have occurred since that date, and ameliorations since then by the defendant, the doubtful and precarious character of the credits transferred, render it difficult, if not impossible, now, and in the present case, to establish, by legal and sufficient proof, the real value of the property transferred to Lionais at the time of such sale and transfer; and seeing that without such proof it is not competent for this Court to annul or rescind the aforesaid deed upon the ground of *Usion*.

Considering, moreover, that it is difficult to determine what was the real amount of the consideration which the defendant undertook to pay to Regnier and his wife, from the peculiar nature as regards Regnier's share, and also because a portion of the price to be paid was of an aleatory character.

Seeing, moreover, that it appears, by the evidence adduced, that the plaintiff, Lemoine, himself paid only the sum of £1075 for the share of Madame Regnier, that is to say, for more than one-half of the property sold and transferred to Lionais by *acte* of 30th Oct.,

1846, the restitution of which is sought by the present action, and for which share Lionais, eight years previously, undertook to pay Madame Regnier the sum of £4500. Considering that for these reasons, and for others above assigned, the present action cannot be maintained, nor the deed of 30th Oct., 1846, rescinded and annulled, the Court hath dismissed and doth hereby dismiss the present action with costs."*

Fleming, for the plaintiff. *Barnard*, counsel.

Leblanc & Cassidy, for the defendant.

RECENT ENGLISH DECISIONS.

HOUSE OF LORDS.

Corporation—Public Improvements.—Where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object, may be restrained by injunction from any attempt to take them for another object. *Galloway v. Mayor and Commonalty of London*. Law Rep. 1 H. L. 34.

Parol Agreement—Tenancy.—If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. So, if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined. *Ramsden v. Dyson*, Law Rep. 1 H. L. 129.

* The case is now before the Court of Appeals.

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AUTHORITY OF COUNSEL.

The case of *Strauss v. Francis*, Law Rep. 1 Q. B. 379, is of considerable interest to the profession as a decision upon the powers of counsel in conducting trials. The point held was that "it is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within the counsel's apparent authority, is binding on the client notwithstanding he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time." The action was brought against the defendant, as publisher of the *Athenæum*, for an alleged libel contained in a criticism on a novel of the plaintiff, styled *The Old Ledger*. The criticism was as follows:—"Our first impression on opening this production was that so many italics and inverted commas were never congregated into the same space before; our last on closing it is that it must be the very worst attempt at a novel that has ever been perpetrated. It cannot even claim the utility of an opiate: its inanity, self-complacency, vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English, its perpetual recurrence of abuse, or, as the author more euphemistically expresses it, 'slightly digressive reflections' on great men, living and dead, and wholly unconnected with the subject,—all make the reader more indignant than weary, and how much this means can only be conceived by an operation which few are likely to attempt, and fewer still to achieve, that of reading the book." The plea was, "not guilty."

At the trial before Erle, C. J., Mr. Serjeant Ballantine, for the plaintiff, simply put in the article in question, and proved that it had reference to the plaintiff's novel. Mr. Hawkins, Q. C., for the defendant, read various paragraphs from the novel, which he con-

tended fully justified the criticism. While he was addressing the jury Mr. Ballantine interposed, and a juror was withdrawn by consent, of which course the Chief Justice expressed his approval. The plaintiff subsequently moved to set aside the compromise, and for a new trial, on the ground that the withdrawal of a juror was against his express wish. The judges, however, were all of opinion that the application must be refused. Blackburn, J., remarked:—"Mr. Kenealy (the plaintiff's counsel) has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill, and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client." Mellor, J., expressed a similar opinion, observing that "no counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause on the terms which the plaintiff's counsel seems to suggest, viz., without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief. I am quite sure no such limitation of authority was consented to by the counsel on the present occasion; and I think the power to withdraw a juror is strictly within the limits of the conduct of the cause. Nothing can be more to the advantage of a client than that the counsel should have the power to enter into a compromise of this kind, when he finds his own case become desperate, or an overwhelming case made by his adversary."

RETAINERS.

We copy below a singular correspondence which appeared in the *Times*, between Messrs. Shaen and Roscoe, solicitors to the Jamaica Committee, and Mr. Coleridge, Q. C., with reference to the retainer accepted by that gentleman, but objected to by Mr. Rose, repre-

senting Mr. Eyre. However flattering to Mr. Coleridge to have both parties competing for his services, it can hardly be palatable to him to be dictated to, as he appears to have been, by the Attorney General. The first letter was addressed by Messrs. Shaen and Roscoe to Mr. Coleridge:—

"8, Bedford-row, Nov. 2.

"Dear Sir,—In reference to the objection which has been taken by Mr. Rose to the retainer which we have left with you on behalf of the Jamaica Committee, we, of course, have no wish to take any opinion or decision except your own; and in reference to it we venture to submit that the Jamaica Committee, as is well known from its advertisements and other printed papers, consists of Messrs. J. S. Mill, M. P., P. A. Taylor, M. P., treasurer, F. W. Chesson, hon. secretary, and others; and that if they are incapable of retaining counsel, it must, of course, be upon grounds equally applicable to all other voluntary societies.

"As a matter of fact such societies have been constantly in the habit of tendering retainers, which have been as constantly accepted and acted upon by counsel for many years. Some months ago Mr. E. James, Q. C., M.P., and Mr. Fitzjames Stephen accepted retainers on behalf of the Jamaica Committee. It is, perhaps, not altogether immaterial that in this particular case, after we had left the retainer at your chambers, a correspondence ensued in reference to it which resulted in a note from yourself, intimating that you accepted the retainer.

"As a matter of reason it is frequently quite as important to a voluntary association to retain the services of counsel as to a corporate body or an individual. It is unnecessary to do more than refer to the litigation which has of late years been becoming more and more frequent and important, connected with provisional committees for the formation of joint-stock companies. In Chancery, indeed, voluntary associations are every day parties to litigation, as they are also as individual members in the courts of common law. We happen at the present moment to be engaged in a case of considerable importance in Chancery, in which the Bishop of Natal is plaintiff, while the defendants are the

Council of the Colonial Bishopric Fund, a voluntary body without any incorporation or legal *status* to distinguish it from the Jamaica Committee.

"If the objection is good, it is good against all voluntary associations, and this would, in fact, outlaw all societies for the promotion of literature, science, and the fine arts, and all clubs, and all the numerous societies which are formed for the express purpose of enforcing certain branches of the law, such as the society for the Suppression of Vice, for the Prevention of Cruelty to Animals, the Society for the Protection of Women, &c.

"Should you deem it advisable that the question shall be submitted to the Attorney General, we shall be glad if you will kindly lay before him this letter as what we have to say on the subject.

We are, dear Sir, yours faithfully,

"SHAEN & ROSCOE."

To this letter Mr. Coleridge replied as follows:—

"Westminster Hall, Nov. 3.

"Dear Sir,—I consider your retainer binding, and, for my own part, think there is nothing at all in Mr. Rose's objection. I shall take no steps in the matter, but if I am told by the Attorney-General that I am bound as a matter of professional rule to act for Mr. Eyre, of course I must do so. I can hardly conceive he will tell me so, and I shall not myself ask him any questions. Why, under the circumstances, it is thought the least worth while to contest the matter I cannot understand; but that is no concern of mine.

Believe me to be, your faithful servant,

"J. D. COLERIDGE."

On learning the decision of the Attorney-General Mr. Shaen wrote the following letter to Mr. Coleridge:—

"November 10.

"Dear Sir,—The Attorney-General has stated it to be his opinion that the retainer of Mr. Rose does, and that the retainer of my firm does not, prevail. I took the liberty of requesting the Attorney-General to let me know the grounds of his opinion, but he declined to do so, saying that such a course was not usual.

"If you consider yourself bound by this opinion I must of course submit, but I respectfully protest, on behalf of my clients, that they ought not, upon unexplained and technical grounds, to lose the benefit of a retainer which has been given and accepted in good faith. I have always understood that the relations between counsel and client were founded, not upon any law of contract, but upon an honourable understanding, and that the etiquette of the Bar, which, I presume, regulates the practice as to retainers, was designed only to protect counsel from conduct unbecoming gentlemen. If I am right in this, I venture to submit that the retainer which was given in the case by my firm forms an honourable understanding which cannot be upset by the offer of a retainer which is substantially that of another committee, who have already requested you in vain to lend them the support of your name. If my retainer is to be upset on account of any peculiarity in its wording, then in the name of the profession I protest against the introduction or the maintenance of unpublished technical rules upon a subject in which they are unnecessary, and for which they are unfitted. If my retainer is to be upset on the ground that such a body as the Jamaica Committee is unable in any form to retain counsel, then in the name of the general public I protest against a doctrine which rests upon no intelligible grounds, which if enforced universally would practically outlaw vast numbers of associations formed to promote the best interests of society, and which is in fact violated by the every day practice of the leaders of the profession.

"I am, dear Sir, yours faithfully,

"WILLIAM SHAEN."

Mr. Coleridge replied as follows:—

"The Athenæum, Nov. 12.

"Dear Sir,—I regret the decision at which the Attorney-General has arrived, but you will remember I told you some time ago that, whatever his decision, I should feel myself bound by it, whether I agreed with it or not. I must adhere to that determination. I cannot set myself against the authority of the head of the Bar in a matter as to which he is the recognized judge. I hope you will see, as plainly

as I do, that it is really of extremely little consequence.

"Believe me to be your faithful servant,

"J. D. COLERIDGE.

"Messrs. Shaen and Roscoe."

LEGAL EXPENSES IN ENGLAND.

To the Editor of the Lower Canada Law Journal.

Sir,—I enclose you, 1st, a communication to the *Times*, showing the cost in England of distributing a small sum of money among claimants. In Lower Canada the same distribution would cost less than half the "Fees of taxation of costs" stated in this communication.

I also enclose a Law Report from the same paper, *Knight v. Wheeler*.

From this you will see that, besides two sets of Solicitors, four eminent Counsel are engaged towards settlement of a disputed account of twenty-two pounds odd. The costs on both sides in that case, I am assured, would amount to upwards of a hundred and fifty pounds. In Lower Canada such a case would be disposed of at costs, on both sides, after full contestation, of forty dollars.

To the Editor of the Times.

Sir,—As you inserted a letter in *The Times* of this date, relating to an estate in bankruptcy, I shall be glad if you can find space for the subjoined statement, as such an example of the mode of realizing estates under our present laws in Chancery will, I also think, be of service to the public, by calling the attention of the legal authorities to the subject.

Statement of the accounts, showing the result of a Chancery suit just concluded:—

Receipts.

Proceeds of the sale of real estate	
and investments of the dividends	
by the Accountant-General in	
Chancery.....	£717 3 10

Payments.

Plaintiff's solicitor's	
costs.....	£449 14 2
Defendant's solicitor's	
costs.....	234 8 4
	£684 2 6
Fees of taxation of	
costs.....	18 5 0
	702 7 6
Leaving a balance of.....	£14 16 4

I remain, Sir, yours obediently,
Canonbury, Islington, Dec. 11. J. A.

SECOND COURT.

(Before Mr. Justice KEATING and a Common Jury.)

KNIGHT v. WHEELER.

Sir R. P. Collier, Q.C., and Mr. R. E. Turner were counsel for the plaintiff; Mr. M. Chambers, Q.C., and Mr. J. O. Griffiths for the defendant.

This was an action to recover £22 and some odd shillings for laying some paving-stone in front of the defendant's house in the course of the year 1865.

The plaintiff was described to be a surveyor at Mile-end, and the defendant is a banker and brewer at High Wycombe, and the only question was whether the defendant was personally liable, or whether the work was done for the Paving Commissioners of the town of High Wycombe.

The jury returned a verdict for the plaintiff for £20 18s.

A gentleman died here lately. Copy of his will was sent to England to be registered, in order to letters of administration of personal property there being obtained for my client, the executor and administrator named in the will. Such letters have been obtained, of course; but in addition to £116 17 8 to the Proctor at Doctors Commons, [in which, however, was comprehended £50 for stamp duty,] my client had to pay £25 18 8 sterling to Solicitors! All done in this case would have been done in Lower Canada for twelve pounds ten, or under. To be priest-ridden is bad, to be law-ridden is as bad. John Bull is very patient, evidently, or he would reform his lawyers' bills. We, in Canada, have some things to be thankful for.

Yours,

AN ADVOCATE.

Montreal, January 4, 1867.

[In looking over English law reports, the reader is constantly struck with the vastness of the sums incurred as costs. Thus, to take one instance out of many, in *Wentworth v. Lloyd*, p. 280 of *Weekly Notes* for 1866, a question came up whether the taxing-master was right in disallowing an item of £72, (\$350) being a charge at the rate of fourpence per folio, by a Solicitor, for reading certain depositions taken before a special examiner in

Australia. The master had allowed a sum of £292 for preparing briefs of the same depositions. The Master of the Rolls thought that the Solicitor was entitled to some payment for reading them, but he reduced the item to £50. As to the £292 for preparing briefs, "that was the ordinary charge!"

While upon this subject, it may be interesting to copy here a rather severe sketch by Bulwer, which recently appeared in *Blackwood*. We, in Lower Canada, have the good fortune not to be subjected to the tedious and degrading tariff of charges between solicitor and client which Bulwer satirises as follows:—

"THE BILL OF COSTS.—When men go to law, I believe that in general they pay little attention to the probable cost of the suit. There is a claim to be advanced, or a right to be defended, or a demand to be resisted, which are quite sufficient to engross all anxiety. Once actually engaged in the process, the game becomes too absorbing to admit of a thought beyond the issue. Gain and *amour propre* get inextricably mingled, and the desire to win rises to a passion. Your lawyer is all this time not merely your agent, he is your affectionate friend, your trusted ally and adviser. You go to him for counsel and guidance, and you go to him besides for encouragement and consolation. He is a sort of well of official sympathy, of which you drink at all hours, happily unmindful the while that every draught of the precious spring is noted down with a corresponding six-and-eight-pence appended to it.

"The day comes, however, when, victor or vanquished, this friend's mission is to cease, and his good offices to terminate. You know that he has done certain things on your behalf, and you remember besides, the warm interest he has vouchsafed you, the numberless little occasions on which he has shown consideration for your feelings, and you recall small traits of attention, that, coming from a class of men the world is so prone to censure and sneer at, actually elevate humanity in your esteem. 'If these things can be done in the green wood,' say you to yourself, 'what may not be expected from archdeacons and deans?' What a shock then is it to your feelings, excited as they are, when this man's bill

of costs comes in, and you find not only are all the formal interviews between you duly recorded and estimated, but every chance meeting, every passing rencontre in the street or the market place, ay, even to little hospitable confabulations over your own sherry in the azure dimness of your own cuban. There they are, all of them, with the formidable title of "Consultation," as if that absurd incident that happened to you at Boulogne, or that little adventure of yours with the widow in Wales, should ever figure in this shape, and come back to your mind associated with a demand for thirteen-and-fourpence. I know of no bitterness to compare with the revulsion of that moment. Never before has human nature appeared to you so mean and so despicable. What! you ask yourself, is this the man you have been associating with, at such a sacrifice to all your tastes and liking? White baiting him at Greenwich, and imposing him upon your friends as a worthy fellow at bottom? for whom you have stooped to what score of meannesses in apologies for this or that in his behaviour? Is this the creature—you call him creature now—whom you have treated as an intimate or an equal; telling him your choicest stories, regaling him with your driest *amontillado*, and recounting for his edification, those little traits of your early life, which, had it not been for the indolence of your disposition, would have, ere this, made you a Cabinet Minister or a Lord Chancellor? Is this the serpent you have been nursing in your bosom? For a while the whole wide universe seems hateful and repulsive, and you actually dread the commonest intercourse with your fellows, lest your passing greeting or your farewell rise against you in six-and-eightpences." Ed.]

RECENT ENGLISH DECISIONS.

HOUSE OF LORDS.

Corporation—Damages.—The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls

received by the private person, or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished. *Mersey Docks Trustees v. Gibbs*, Law Rep. 1 H. L. 93.

Riparian Ownership—Alocus of a running Stream.—The soil of the *alocus* is not the common property of the respective owners on the opposite sides of the river; the share of each belongs to him in severalty, and extends *usque ad medium filum aquæ*; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream. A fence or bulwark on the bank is allowable; but the *alocus* is sacred. Any encroachment by one proprietor may be resisted by the other; and the onus of proving that the act is *not* an encroachment falls on the party doing it, who is *prima facie* held responsible. Mere apprehension, without some show of injury, will not ground a complaint; but it is not necessary to obtain or to be guided by scientific opinions. *Per Lord Westbury*.—This decision establishes the important principle, that an encroachment on the *alocus* of a running stream may be complained of, without the necessity of proving that damage has been sustained, or is likely to be sustained. *Bickett v. Morris*, Law Rep. 1 H. L. Sc. 47.

Will—Gift, original and substitutional.—A testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease, to distribute and divide the whole, &c., amongst such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share":—*Held*, that "issue" here meant children; and that the words, "should then be dead leaving issue," meant, should before then have died leaving issue.

Three of the nephews died in the life-time of the testator's widow, two of them without ever having had a child, one of them leaving a daughter. This daughter, likewise, died before the widow:—*Held*, that the gift to the

children was original, not substitutional, and that this daughter, upon her father's death, took a vested interest in the share which, if he had survived, he would have taken. The fact that the gift to the parent was contingent did not affect the nature of the gift to the issue, which was an independent bequest. *Martin v. Holgate*, Law Rep. 1 H. L. 175.

PRIVY COUNCIL.

Practice—Appeal.—Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below: upon the allegation, that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject matter at issue exceeded in value the appealable amount. *Mutusuomy Jagavera Yettiara Naiker v. Vencatanevara Yettia*, Law Rep. 1 P. C. 1.

Insolvency—Partnership—Liability of New Firm for debts of Old.—R., F., and R., partners in business, and dealing with F. S. & Co., took T. and S., clerks in their employment, into partnership with them. The partnership was constituted by deed, to continue for three years; and a balance sheet, showing the liabilities and assets of the existing firm, was drawn up and admitted by all the partners. The new firm continued to trade, up to the period of its insolvency, upon the same footing and with the same books as the old firm—no distinction being made in their payments, or balances, or between the debts or assets of the new, or what was the old firm. F., S. & Co. continued to deal with the new as they had done with the old firm. R., F. & R. having become insolvent, F., S. & Co., creditors to a large amount, proved against the estate of the new firm. R. and B., also creditors of the new firm, proved against their estate: and sought to expunge the proof of F., S. & Co., on the ground that their debt having accrued previous to the new partners being taken in, was due from the old, and not from the new firm:—*Held*, by the Judicial Committee (affirming the judgment of the Supreme Court of Victoria), that there was sufficient proof in the dealings and transactions of the

several parties, to show that the new firm on its formation adopted the liabilities of the old firm, and that F., S. & Co. had consented to accept the liability of the new firm, and to discharge the old firm, their original debtors.

The Act 5 Vict., No. 17 (the principal *Insolvent Act* of the colony of Victoria), sec. 39, enacts, "that any creditor who shall have or hold any security or lien upon any part of the insolvent estate, shall, when he is the petitioning creditor, be obliged upon oath, in the affidavit accompanying the petition, and when he is not the petitioning creditor, in the affidavit produced by him at the time of proving his debt, to put a value upon such security, so far as his debt may be thereby covered, and to deduct such value from the debt proved by him, and to give his vote in all matters respecting the insolvent estate as creditor only for the balance, &c. And in case any creditor shall hold any security or lien for payment of his debt, &c., upon any part of the said estate, the amount or value of such security or lien shall be deducted from his debt, and he shall only be ranked for, or receive payment of, or a dividend for, the balance after such deduction." *Held*, that this enactment does not destroy the distinction between the joint and separate estate of an insolvent, so as to compel a creditor, holding a mortgage security on the separate estate, to estimate and deduct its value, before he can be allowed to prove against the joint estate. *Rolfe and The Bank of Australasia v. Flower, Salting & Co.*, Law Rep. 1 P. C. 27.

Vice-Admiralty Court—Appeal to Privy Council.—Sec. 23 of the 26 & 27 Vic., c. 24, which limits the time for appealing from the Vice-Admiralty Courts abroad to six months, vests, by the same section, a discretion in the Judicial Committee to admit an appeal not withstanding six months have elapsed. Circumstances showing that there was no wilful laches in not lodging petition of appeal in the Registry of the High Court of Admiralty within the prescribed time, and that the delay arose from the parties waiting a decision on a pending appeal, which involved a similar question, held sufficient for the exercise of the discretion vested in the Judicial Committee, to admit an appeal under that section, upon payment of

the costs of the application, and giving security for further costs. *Cassanova v. Regina*, Law Rep. 1 P. C. 115.

Letters Patent—Prolongation of Term.—To entitle a patentee to a prolongation of the term of Letters Patent, he must satisfactorily establish the amount of his profits.—A patentee did not manufacture or sell the patented article (ship anchors), but granted licenses to ironsmiths to manufacture, from whom he received royalties. On an application by him for an extension of the term of the Letters Patent, on the ground of inadequate remuneration, the accounts produced of his own expenditure in carrying on the patent being unsatisfactory, and no accounts given of the profits derived by the licensees, a prolongation of the Letters Patent was refused; first, as the patentee's accounts were unsatisfactory; and, secondly, from the patentee having so dealt with his patent rights as to deprive him of the power of showing the amount of profit derived from the working of the patent. *In re Trotman's Patent*, Law Rep. 1 P. C. 118.

Sale of Hull of stranded Ship by auction—Variation of Conditions of Sale—Re-sale.—Action to recover the difference between the original price bid at public auction, and the sum realized upon a re-sale, for the hull of a stranded vessel, sold by the master and purchased by the defendant, upon conditions of sale, which were appended to the memorandum of purchase, and signed after the sale by the defendant's agent on his behalf; which conditions differed materially from those appended to the catalogue of sale, and which were the conditions read out at the auction. The defendant paid the deposit upon the terms of the conditions of sale read at the auction, and took possession of the vessel, without having any formal transfer made to him. The vessel was laden with rice, and was soon afterwards, by order of the Board of Health, destroyed as a nuisance. The defendant having declined to complete the purchase, the vendor resumed possession of the vessel, and re-sold it at a loss. The form of the action was by libel, according to the Roman-Dutch law. The defendant in his answer, among other defences, denied that he had purchased under

the conditions appended to the memorandum of sale, and prayed the dismissal of the action with costs; and in reconvention, for payment of the amount of the deposit and damages he had sustained, to the amount of £1,000, for loss of profits and advantages from the vessel, her tackle and implements. The judgment of the District Court was in favour of the plaintiff, the judge of that Court being of opinion, that the defendant purchased on the conditions of sale appended to the memorandum of purchase, and that, according to those conditions, the plaintiff had rightly resumed possession and re-sold the vessel. The Supreme Court (of Ceylon) reversed that judgment, and ordered judgment to be entered for the defendant, being of opinion that the plaintiff having founded his claim upon an agreement which gave, among other things, a right of re-sale, with conditions different from those read at the auction, and having, in consequence, repossessed himself of the vessel and re-sold her, had thereby deprived himself of the right to recover from the defendant, and awarded the defendant the damages claimed by his answer:—*Held*, by the Judicial Committee, 1st, that though the merits of the case were with the plaintiff, neither the judgment of the District or Supreme Court could be sustained, as there was no other agreement between the parties than the one founded on the conditions read out in the auction room at the sale; and that the plaintiff, having sued upon a different contract, was not entitled to recover, and ought to have been non-suited; and, 2nd, that in the absence of any evidence of damage, the defendant was not entitled to judgment for damages:—*Held*, further, that although the act of the plaintiff, in retaking the hull of the ship and selling her was wrongful, and entitled the defendant to bring an action of trover, it did not amount to a rescission of the contract. If before actual delivery, the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance which may be still due. The rule applies where there has been a delivery, and the vendor afterwards takes

the property out of the possession of the purchaser, and re-sells it. *Page v. Cowasjee Eduljee*, Law Rep. 1 P. C. 127.

Mauritius, Law of—Code Civil, Art. 1384—Committant and Préposé, definition of—Master and Servant—Negligence—Fire—Liability for Damage.—By Art. 1384 of the Code Civil, the law prevailing in Mauritius, it is provided that "*Les Maîtres et les Commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.*"—*Held*, that in order to make the "commettant" responsible for damage occasioned by the negligence of the "préposé," it is necessary to establish that the "préposé" was acting "*sous les ordres, sous la direction et la surveillance du commettant.*" "*Préposé*," in Art. 1384, means a person who stands in the same relation to the "commettant" as "domestique" does to "maître," namely, a person whom the "commettant" has instructed to perform certain things on his behalf.—A. hired certain Indians, who were the heads of gangs of labourers, to clear a piece of land of weeds and brushwood at a job price, to be paid to their gang. Through the negligence of the persons employed, the sparks of a fire kindled on A.'s land set fire to and burnt down a house in the immediate neighbourhood, belonging to B. It was proved in evidence that A. interfered with the work, and directed the Indians where to work:—*Held*, affirming the judgment of the Supreme Court at Mauritius, that A. was the "commettant," and the labourers "préposés," within the meaning of the Art. 1384 of the Code Civil, and that as the fire was occasioned by the men employed by A., he was responsible for their negligence, and liable to B. for the damage sustained by the fire. *Sérandat v. Saïsse*, Law Rep. 1 P. C. 152.

Code Civil—Arts. 765, 766—Irregular Succession.—The Code Civil of France, which is in force in the Island of Mauritius, Liv. III. Ch. IV. tit. 1, "*Des successions irrégulières*," Art. 765, provides as follows:—

"*La succession de l'enfant naturel décédé sans postérité est dévolue au père ou à la mère qui l'a reconnu; ou par moitié à tous les deux, s'il a été reconnu par l'un et par l'autre.*" and

Art. 766 provides, "*En cas de prédécès des père et mère de l'enfant naturel, les biens qu'il en avait reçus passent aux frères ou sœurs légitimes, s'ils se retrouvent en nature dans la succession: les actions en reprise, s'il en existe, ou le prix de ces biens aliénés, s'il est encore dû, retournent également aux frères et sœurs légitimes. Tous les autres biens passent aux frères et sœurs naturels, ou à leurs descendants.*"

Held, that the word "descendants" in Art. 769, is not limited to legitimate descendants, so as to preclude the natural children of a natural brother succeeding to their natural uncle's property.

Held, further, that there is no restriction with respect to the word "descendants" in Art. 766; that natural children are "descendants" within the meaning of Arts. 765 and 766, which constitute a special law for determining the succession of natural children dying without posterity; and that "postérité" and "descendants" in those Articles are convertible terms.—B., an illegitimate child duly acknowledged, survived his parents, and died domiciled in the Island of Mauritius, of which he was a native, intestate, leaving self-acquired property. He had no legitimate relations, but had two nieces, illegitimate daughters of an only illegitimate brother, who pre-deceased him, by whom they were duly acknowledged, as also by B. One of the nieces died shortly after B., having previously constituted her sister *legataire universelle*. The Government claimed the succession of B.:—*Held*, that the surviving niece was entitled to succeed to B.'s property in preference to the claim of the Government on the ground of bastardy. *Her Majesty's Procurator v. Bruneau*, Law Rep. 1 P. C. 169.

EQUITY CASES.

Immoral Purpose.—A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up, at the end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify

the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee, which was being administered:—*Held*, that the assignment, and everything arising out of it, was so tainted with the immoral purpose, that the plaintiff could not recover. *Smith v. White*, Law Rep. 1 Eq. 626.

Construction of Will.—Gift by will of a sum of stock to A. for life, remainder to any wife he might thereafter marry for life or widowhood, remainder to the children of A. absolutely; and in case A. should die *unmarried and without issue*, then, from and after his decease, to B., C., and D., share and share alike, or to such of them as should be living at A.'s death, his, her, or their executors, administrators and assigns absolutely. A. survived B., C., and D., and died a widower, without ever having had a child:—*Held*, that upon the death of A. the representatives of B., C., and D. took the legacy in equal shares. The Court, treating the word "unmarried" as a word of flexible meaning, decided that it here meant "without leaving a widow," in order to give expression to the whole clause. *In re Sanders' Trusts*, Law Rep. 1 Eq. 675.

Copyright—Directory.—The compiler of a directory or guide-book, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry, by adopting and re-publishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works, is for the purpose of verifying the correctness of his results. *Kelly v. Morris*, Law Rep. 1 Eq. 697.

COMMON PLEAS.

Insurance—Proximate Cause of Loss or Damage.—By a policy of insurance, plate-glass in the plaintiff's shop-front was insured against "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises,"—

none of the glass being "horizontally placed or moveable." A fire broke out on premises adjoining those of the plaintiff, and slightly damaged the rear of his shop, but did not approach that part where the plate-glass was. Whilst the plaintiff, assisted by neighbours, was removing his stock and furniture to a place of safety, a mob, attracted by the fire, tore down the shop shutters, and broke the windows for the purpose of plunder:—*Held*, that the proximate cause of the damage was the lawless act of the mob, and that it did not originate from "fire, or breakage during removal," within the exception in the policy. *Marsden v. City and County Assurance Company*, Law Rep. 1 C. P. 232.

Bill of Lading.—Goods were shipped for Bombay under a bill of lading making them deliverable "to order or assigns." The consignor indorsed the bill of lading in blank, and deposited it with a banker as security for an advance of money, and, on his repaying the sum advanced, the bill of lading was re-indorsed and delivered back to him:—*Held*, that such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the ship-owners under the original contract; and, consequently, that he was entitled to sue them for a breach, whether occurring before or after such re-indorsement. *Short v. Simpson*, Law Rep. 1 C. P. 248.

Negligence—Unfenced Hole.—Upon the premises of the defendant, a sugar-refiner, was a hole or shoot on a level with the floor, used for raising and lowering sugar to and from the different stories of the building, and usual, necessary and proper in the way of the defendant's business. Whilst in use, it was necessary and proper that this hole should be unfenced. When not in use, it was sometimes necessary, for the purpose of ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might at such times, without injury to the business, have been fenced by a rail. The plaintiff, a journeyman gas-fitter, in the employ of a patentee who had fixed a patent gas-regulator upon the defendant's premises, for which he was to be paid provided it effected a certain amount of saving in the consumption

of gas, went upon the premises with his employer's agent for the purpose of examining the several burners, so as to test the new apparatus. Whilst thus engaged upon an upper floor of the building, the plaintiff, under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found, without any fault or negligence on his part, fell through the hole and was injured:—*Held*, that, inasmuch as the plaintiff was upon the premises on lawful business, in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole or shoot was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him, in suffering the hole to be unfenced. *Indermaur v. Dames*, Law Rep. 1 C. P. 274.

Master and Servant—Negligence of Fellow-servant.—The plaintiff was employed by a railway company as a laborer, to assist in loading what is called a "pick-up train," with materials left by plate-layers and others upon the line. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started,) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured:—*Held*, that, inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment. *Tunney v. Midland Railway Co.*, Law Rep. 1 C. P. 291.

Carrier—Measure of Damages.—The plaintiff sent goods from Manchester by the defendants' railway to his traveller at Cardiff; the delivery of the goods was, through the negli-

gence of the defendants, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff:—*Held*, that in the absence of notice to the defendants of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay. *Great Western Railway Co. v. Redmayne*, Law Rep. 1 C. P. 329.

Breach of Promise of Marriage.—In an action for breach of promise of marriage, where the plaintiff has been seduced by the defendant, it is no misdirection to tell the jury, that, in estimating the damages, they are at liberty to take into their consideration the altered social position of the plaintiff in relation to her home and family, through the defendant's conduct towards her. *Berry v. Da Costa*, Law Rep. 1 C. P. 331.

EXCHEQUER.

Shipping—Marine Policy.—In a homeward policy the words "*at and from*" a port named are to be construed in their natural geographical sense, without reference to the expiration of an outward policy "*to*" the same place, and therefore the policy attaches as soon as the vessel arrives within the port named, and although not *safely moored*.—A vessel insured "*at and from*" Havana was injured by coming into contact with an anchor after entering the harbour, and whilst passing over a shoal up to her place of discharge:—*Held*, that the policy had attached. *Haughton v. Empire Marine Insurance Co.*, Law Rep. 1 Ex. 206.

Contract void for Immorality.—One who makes a contract for sale or hire, with the knowledge that the other contracting party intends to apply the subject matter of the contract to an immoral purpose, cannot recover upon the contract; it is not necessary that he should expect to be paid out of the proceeds of the immoral act.—The defendant, a prostitute, was sued by the plaintiffs, coach-builders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment; but the jury found that the plaintiffs knew her to be a prostitute, and

supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men:—*Held*, that the plaintiffs could not recover. *Pearce v. Brooks*, Law Rep. 1 Ex. 213.

Negligence—Dangerous Instrument.—The defendant exposed in a public place for sale, unfenced, and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. The plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine, whilst another boy was turning the handle which moved it, and his fingers were crushed: *Held*, that the plaintiff could not maintain any action for the injury, the accident being directly caused by his own act. *Mangan v. Atterton*, Law Rep. 1 Ex. 239.

Covenant—Nullity of Marriage.—To an action on a covenant made by the defendant in consideration of his daughter's marriage, the defendant pleaded that the marriage was null and void by reason of the impotence of the husband, without stating that it had been avoided by the sentence of any Court, or that either of the parties had elected to treat it as void:—*Held*, a bad plea, on the ground that whether, as between the parties to it, such marriage could or could not be treated as absolutely null and void, it was certainly not open to a third person to make the objection, when neither of the parties concerned had done any act to raise the question. *Cavell v. Prince*, Law Rep. 1 Ex. 246.

Contract—Illegality—Wager.—The plaintiff and defendant agreed to ride a race, each on his own horse, both the horses ridden to become the property of the winner:—*Held*, that the contract was void under the statute, as being "by way of gaming or wagering." *Coombes v. Dibble*, Law Rep. 1 Ex. 248.

Family Bible.—Entries of pedigree in a family bible or testament, which is produced from the proper custody, are admissible as evidence, without proof of their handwriting or authorship. Baron Martin observed:—"To require evidence of the handwriting or authorship of the entries, is to mistake the

distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been." *Hubbard v. Lees & Purden*, Law Rep. 1 Ex. 255.

CROWN CASES RESERVED.

Receiving—Joint Indictment.—The 24 & 25 Vic. c. 96, s. 94, which enacts that, "If, upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of the said property," extends to cases where, upon an indictment for a joint receipt, it is proved that the prisoners separately received the whole of the stolen property. *The Queen v. Reardon and Bloor*, Law Rep. 1 C. C. 31.

Witness—Incompetency.—The evidence of an incompetent witness may be withdrawn from the jury upon the incompetency appearing during his examination-in-chief, although he has been examined previously on the *voir dire* and pronounced to be competent. The prisoner was tried upon an indictment charging him with an assault upon a deaf and dumb girl, with intent to ravish her. The girl had never been instructed in the deaf and dumb alphabet, but an expert in regard to communicating with deaf and dumb persons believed, after testing her, that he was able to understand her signs and gestures, and to make himself understood by her. He was then sworn to interpret, but in the course of the examination he informed the Court that he was satisfied he had been mistaken, as it appeared that the girl answered "yes" to every question, without distinction. The Court then ordered the witness to be removed from the box, and the trial proceeded. The jury having convicted the prisoner on the other evidence, the judge reserved the point as to the propriety of withdrawing the evidence of the girl when she was found to be incompetent. It was held that he had a perfect

right to do so, and the conviction was affirmed. *The Queen v. Whitehead*, Law Rep. 1 C. C. 33.

Rape—Idiot—Consent.—Upon an indictment for rape there must be some evidence that the act was without the consent of the woman, even where she is an idiot. In such a case, where there were no appearances of force having been used to the woman, and the only evidence of the connection was the prisoner's own admission, coupled with the statement that it was done with her consent, the Court held that there was no evidence for the jury. *The Queen v. Fletcher*, Law Rep. 1 C. C. 39.

PROBATE AND DIVORCE.

Insertion of clause in a codicil by mistake.

—Where a codicil had been read over to a capable testatrix, and duly attested by her, the Court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her to her solicitor, nor were contained in the draft codicil, which had been read over to and approved by her, although such words were sworn by the solicitor who prepared the codicil to have been inserted without any instructions from her, and by his inadvertence. The Court stated the general rules which, since the Wills Act, ought to govern its action in reference to a duly executed paper, as follows:—"First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable tes-

tator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Lastly, that the above rules apply equally to a portion of the will as to the whole." *Guardhouse v. Blackburn*, Law Rep. 1 P. & D. 109.

Suit for Dissolution of Marriage—Collusion.—On the hearing of a suit by a wife for a dissolution of marriage on the ground of adultery, coupled with desertion, it was shown that the adultery charged and proved, was committed by the husband in fulfilment of a promise previously made by him to the wife, that he would give her an opportunity of obtaining a divorce; that the adultery had been committed in order that it might be proved; that evidence of it had been obtained by means of information supplied to the wife by the husband; and that the wife was acting in concert with the husband to obtain evidence of it by the means indicated by him:—*Held*, that the husband and wife were guilty of collusion. Petition dismissed. *Todd v. Todd*, Law Rep. 1 P. & D. 121.

Nullity of Marriage.—In a suit by a woman for nullity, on the ground of the man's impotence, the petitioner's evidence that the marriage had never been consummated was neither corroborated nor contradicted, the medical evidence being consistent both with consummation and non-consummation. It appeared that cohabitation had continued for eight years without complaint on the part of the petitioner, and that the separation was caused by the respondent's ill-treatment of her. The Court found that the charge was not sufficiently proved, and dismissed the petition. *T. v. D.*, Law Rep. 1 P. & D. 127.

Mormon Marriage—Polygamy.—Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman, to the exclusion of all others. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the *lex loci*,

and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognize it as a valid marriage, in a suit instituted by one of the parties against the other, for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations. The petitioner in this case was a man who had renounced the Mormon faith and left Utah. But his Mormon wife refused to accompany him, and became the wife of another Mormon. This was the adultery complained of. The Court refused to grant a dissolution of the marriage, observing that the matrimonial law of England is adapted to the Christian marriage, and wholly inapplicable to polygamy. If the matrimonial law of England were applied to the first of a series of polygamous unions, and a Mormon had married fifty women in succession, the Court "might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life." *Hyde v. Hyde and Woodmansee*, Law Rep. 1 P. & D. 130.

Will.—A will commencing with the words, "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," &c., held, not to be contingent upon the event of the testator's death on the journey he was about to take when the will was executed. *In the Goods of Dobson*, 1 P. & D. 88.

Dissolution of Marriage—Cruelty—Drunkennes.—Habitual drunkenness, and a series of annoyances, and extraordinary conduct on the part of the husband, do not constitute legal cruelty. The communication of a venereal disorder to the wife must have been wilful on the part of the husband to establish it as cruelty. But that wilfulness may be presumed from the surrounding circumstances, by the condition of the husband and by the probabilities of the case, after such explanations as he may offer. *Prima facie*, the hus-

band's state of health is to be presumed to be within his own knowledge; but he may rebut this by his own oath, when admissible as a witness, or by other proof. *Brown v. Brown*, 1 P. & D. 46.

QUEEN'S BENCH.

Principal and Agent—Sale by Auction.—An auctioneer, who is authorized to sell goods on the conditions that purchasers shall pay a deposit at once, and the remainder of the purchase money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; and such payment will not discharge the purchaser. *Williams v. Evans*, Law Rep. 1 Q. B. 352.

Promissory Note.—"On demand I promise to pay to the trustees of the Wesleyan Chapel, or their treasurer for the time being, £100," is a good promissory note, for there is no uncertainty in the payee, as the trustees alone are to be taken as payees, and their treasurer as their agent only to receive payment. *Holmes v. Jaques*, Law Rep. 1 Q. B. 376.

Master and Servant—Second Offence.—A workman entered into a contract with a master to serve him for the term of two years; he absented himself during the continuance of the contract from his master's service, and (under 4 Geo. 4, c. 34, s. 3) he was summoned before justices, convicted, and committed. After the imprisonment had expired, and while the term of service still continued, he refused to return to his master's service, and was again summoned before justices, when he stated that he considered his contract determined by the commitment. The justices found that he *bona fide* believed that he could not be compelled to return to his employment, and dismissed the summons:—*Held*, that although the servant had not returned to the service, yet, as the contract continued, he had been guilty of a fresh offence, for which, notwithstanding his conviction and imprisonment, he could be again convicted; and that his *bona fide* belief that he could not be compelled to return to his employment did not constitute a lawful excuse for his absence. Shee, J., did not approve of this decision, observing that "the justices ought in such

a case to take into their consideration that the person charged has declined absolutely to return to the service, and punish him once for all." *Unwin v. Clarke*, Law. Rep. 1 Q. B. 417.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH (APPEAL SIDE).

Quebec, December Term, 1866.

Coram—DUVAL, C. J., AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ.

COOK ET AL., (Defendants in the Court below) Appellants.

VERRAULT, (Plaintiff in the Court below), Respondent.

Licensed Culler—Measurement of Timber.

Held, that a licensed culler, employed by the Supervisor, cannot recover payment for any other measurement of timber than that directed by the statute, even when specially directed by the owner of the timber to measure it in some other way.

This was an appeal from the final judgment rendered in the cause by the Circuit Court, at Quebec, on the 25th April, 1866, by which the appellants were condemned to pay to the respondent \$130.40, with interest and costs.

The respondent's action in the Court below was for work and labor, and, more particularly, for the re-measuring with a string 1,156 pieces of waney white pine timber, containing 86,933 feet, at \$1.50 per thousand feet.

The appellants pleaded a denial; and that respondent, a duly licensed culler, and attached as such to the Supervisor's Office, had been deputed by the Supervisor to measure such timber; that the charges therefor had been paid to the office; and, moreover, that respondent could not by law claim in his own name any sum of money for measuring appellant's timber.

In answer to the above plea, respondent replied, that he did not claim in his quality of culler to be paid for the work done; but that he had re-measured said timber with a string at appellant's request, after it had been duly measured by "Calliper," the only measurement known to the Statute, and the measurement entered on the books of the Supervisor

of Cullers, as required by law; and that he was entitled to be paid for his services performed, wholly distinct from his quality of culler, and not according to the requirements of the statute respecting the measurement of timber, but for another purpose altogether.

The respondent's evidence established the work done, and the value.

It was proved that the only mode of measurement of waney timber recognised by the Supervisor's Office is the one styled "Calliper" measurement, and the Supervisor will not authorize any other mode; nor will he allow to be entered on the books of his office the dimensions of waney timber taken by any other kind of measurement. In his deposition, the Supervisor said:—"If a culler, or any other person, came to my office with the dimensions of waney timber, measured with a string, by string measurement, in order to have the same entered on the books of the office, and a specification thereof made, I should refuse to receive it." It was proved in the case that, although "Calliper" measurement is the one adopted by the Supervisor's Office, and the one which all owners of waney timber must first have performed, in order to comply with the statute and the rules of the Supervisor's Office, yet the trade at Quebec prefer for waney timber the measurement known as "string" measurement; and such timber is nearly always sold by "string" measurement. This was why the appellants engaged the respondent's services to re-measure the timber, which he had previously measured, according to the rules of the Supervisor's Office, by "Calliper" measurement.

Hearn, for the appellants, urged that the respondent's action in the Court below ought to have been dismissed, as under Cap. 46, C. S. C. (An Act respecting the culling and measuring of timber), he being a licensed culler in the employ of the Supervisor, not only could not recover payment for the measuring which he claims to have done, but was subject to a penalty of \$400, for having done it without the knowledge and consent of the Supervisor, who alone has the right to sue for payment for work done by the cullers in his service.

Allyn, for respondent. There is nothing in the law to prevent the respondent from

performing the work for which he now claims to be paid. He had previously, upon the order of the Supervisor of Cullers, measured the timber in question by "Calliper" measurement, and a proper return thereof had been made to the Supervisor's Office and entered in the books of the office.

It was then that the appellants required the respondent to re-measure said timber with a string, as by that measurement appellants sold said timber to Dobell & Co.; and it was absolutely necessary that it should be so measured in the interest of the defendants, so as to enable them to be paid by the purchasers of the timber, Messrs. Dobell & Co., who had bought it to be paid for by string measurement.

In the present instance the respondent did not infringe the law, or act in any way contrary to his duty as a licensed culler, inasmuch as he had performed the work imposed upon him by law, and made a proper return thereof to the office; and in measuring the timber afterwards with a string, he did that which it was necessary for the appellants to have performed in order to sell their timber, and which the Supervisor of Cullers or his office would not officially recognise.

BADGLEY, J. This action is for the recovery, by a licensed culler, of his string measurement, for which he was not paid, done simultaneously by him with the legal measurement by "Calliper," for which he was paid. The defendants had at Quebec a raft of timber which required necessarily to be measured and specified through the Supervisor's Office. They held over, however, making their application to the Supervisor, until the plaintiff's turn for service should come on the office roll, in order to serve him, by giving him a considerable job. He was in due time appointed to the service, and performed the duty by the legally recognized official *calliper* measurement, which he duly reported at the office, and for which he received his full payment; but whilst so employed in this official measurement, he also made the string measurement which he did not report to the office, the payment of which he now claims from the defendants.

According to law and to the enactments of

the statute in that behalf, all timber arriving at Quebec must be measured for shipment, and the measurement is required to be done by a licensed culler whose name stands on the Supervisor's list or roll, and who is named to that duty by the Supervisor, when demanded by the owner of the timber. The statutory measurement is by "Calliper," and the results of that measurement, when completed, must be returned to the office of the Supervisor, by whom the specifications of quantities are drawn, and verified by the measuring culler himself. No other measurement is recognized by law; the rates for the measurement are fixed by the statute, and are required to be paid into the office, where the culler is paid therefrom for himself and his assistants, so that no possible collusion could take place between the owner of the timber and the measurer of it.

The defendants procured the plaintiff's service for the measurement as above stated: his order from the office was dated on the 5th September, and was returned to the office with his work done on the 13th October following, and thereupon the specifications were made. The office fees paid by the defendants amounted to £100, of which the plaintiff received £64. No particular time was limited for the doing of the work, which was paid for by the tariff according to the quantity measured. The legislature requires that the measurement should be made by Calliper, and recognizes none other as statutory; the trade sometimes uses the string measurement (*au cordon*), which does not necessitate the act of a licensed culler, and might be made by any competent person. The plaintiff as a licensed culler made the Calliper measurement, and *simultaneously* with that made the string measurement. The Calliper measurement was for the requirements of the law, the string measurement for the requirements of the trade. If the latter were made independently of the former, and after it had been done and returned to the office, it would of course not be obnoxious to the statutory penalties, because in that case the law had been complied with. String measurement then in itself was not illegal, and only became so under particular circumstances.

Now the plaintiff's action, as set out in his declaration, was simply for work and labor, and particularly for remeasuring with a string the mentioned quantity of timber, at \$1.50 per M. feet. The defendants denied their liability, and specially alleged that plaintiff was a licensed culler, had been duly deputed to measure the timber and had done so; that the regular charges therefor had been duly paid into the Supervisor's office, and that as such licensed culler he could not by law claim in his own name any money for measuring by string the defendant's timber. To this the plaintiff replied that he did not claim as a culler for the work done; 2d, that he had measured the timber with string at the defendants' request *after it had been measured by 'Calliper,'* and after it was so entered in the supervisor's books, and concluded that he was by law entitled to be paid for the services by him performed distinct from his quality of culler.

This special replication entirely changes the original ground of action, and offers issues different from the assumpsit counts of his declaration. But considering the issues as thus raised of record, three points present themselves: 1. That he had no claim for the work if done in his quality of a licensed culler; 2. That his string measurement was made after the completion by him of the statutory measurement by 'Calliper'; 3. That these services performed by him were distinct from his quality of culler. Now, by setting out these facts the implication of law which he offers is that if these facts are not so as stated by him he can have no right of action. Now it is proved in evidence that he was paid for what he did as a licensed culler, and that the string measurement was made by him at the same time as that by "Calliper." His action therefore ought to have been dismissed in the Court below.

The foregoing remarks have been confined to the facts of the case, but if the action be considered in connection with the statute, the same result will be arrived at. In this connection it must be observed that the two measurements were simultaneous, that they were performed by the same person, the plaintiff, a licensed culler duly selected by the Supervisor to perform a legal duty, and that the lumber

had not been previously measured by any licensed culler. The 36th sect. of the Statute, Ch. 46 C. S. C., (An Act respecting the culling and measurement of lumber), provides "that any culler licensed under the act, and not employed by the Supervisor, may engage or hire himself to merchants, or others, as a shipping culler; but such culler shall in no case measure, cull, count, stamp, or mark any description of lumber, before the same has been first measured by some licensed culler other than himself, under the direction of the Supervisor, except by the written permission of the Supervisor, &c., &c.; and any culler so hired and engaged, offending against this act shall incur a penalty not exceeding \$400, or imprisonment, &c." By the 37th section, it is further provided that "any culler employed by the Supervisor, who shall privily, and without the knowledge and consent of the Supervisor, or for hire or gain, and without the same being duly entered on the books of the Supervisor, measure, cull, mark or stamp any article of lumber, shall incur a penalty not exceeding four hundred dollars, or imprisonment for a term not exceeding six months, in the discretion of the Court, for each such offence."

These enactments are conclusive against this licensed culler, the plaintiff in the cause. The penalties are prohibitory, and prohibitive laws import nullity, even although such nullity be not therein expressed. The respondent's action ought to have been dismissed by the S. C., and the appellants' appeal must be maintained.

DUVAL, C. J. In concurring with this judgment, I bend to a statute of which I cannot approve. The plaintiff has clearly done work at special request, for which he cannot obtain payment. The "Calliper" measure merchants will neither sell nor purchase by, and yet it is the only means of measurement recognized at the Supervisor of Cullers' Office. I am afraid that of the legislator who framed this law, it must be said—*Quod non voluit dixit*. I therefore concur in the judgment of the Court, though with great reluctance, as I consider it an injustice done to the plaintiff.

MONDELET, J. I was at first about to dissent from the judgment, but like the Hon-

Chief Justice, I feel myself obliged to bend to a statute which I cannot endorse, and to concur in the decision of the Court.

Hearn, Jordan & Roche, for the appellants.

Alley & Alley, for the respondent.

(I. T. W.)

CIRCUIT COURT.

Quebec, December, 1866.

ROCHETTE v. FORGUES.

Practice—Taxation of Witness.

Held, that any one in public employ is entitled to be taxed as a witness; and if he is a professional man, he must be taxed at the rate which the tariff allows to practising members of his profession.

This was a case which arose out of an objection made to the taxation of M. Leprohon as a witness. If taxed at all, it was urged that he should be taxed simply as a clerk, and not as an advocate; on the ground that being a member of the civil service he lost nothing by attending at Court as a witness; and if he did lose anything, his time should simply be valued as that of an ordinary clerk and not as that of an advocate, inasmuch as he did not practise his profession.

MEREDITH, C. J. This objection has often to my knowledge been urged before, and being anxious now to settle the question, I have consulted with my brother judges to find out their opinion upon it, and we have come to the conclusion, that any gentleman in public employ, attending Court as a witness, ought to be taxed as any other witness is, and if he happens to be a professional man he is entitled to taxation as such; for otherwise some of the most eminent professional men who have ceased to practise, would only be allowed 7s. 6d. a day for giving attendance here, to the detriment of what may be far more important business to them, while others, with half their claim, would receive \$4.50.

Taxation ordered accordingly.

(I. T. W.)

SUPERIOR COURT.

MONTREAL, Nov. 30, 1866.

BENSON v. MULHOLLAND AND ANOTHER.

Sale—Deduction for damaged goods—Guarantee as to condition.

The plaintiff sold to the defendants, through a broker, a quantity of iron, [which the defendants sent a clerk to examine, and test the *quality* of, before completing the purchase. Nothing was specifically stated by the broker as to the *condition* of the goods, but he sold them as in good order. Subsequently part of the iron was found to be rusty and damaged.

Held, that the plaintiff sold the iron as merchantable and in good order; and that the examination of the *quality*, made by the defendants, did not debar them from their right to claim a deduction for the damaged *condition* of the goods.

This was an action for \$448, for goods sold. The plaintiff set out that he, by and through the ministry of Brady, a broker, acting in that behalf for the plaintiff and defendants, at Montreal, on the 31st of August, 1865, contracted and agreed with the defendants, and the defendants contracted and agreed with the plaintiff, to buy and receive from, and to pay for to the plaintiff; and the said plaintiff by the ministry aforesaid did sell, and the defendants did purchase from the plaintiff, the following quantities of iron, and at the following prices, [here followed a list of the bundles of hoop and bar iron] in all £112, payable six months after said date. Whereupon the said Brady, in due course, delivered the usual broker's notes to the said parties, plaintiff and defendants, to wit, the sold note to the plaintiff and the bought note to the defendants. That the plaintiff, under said contract and agreement, in due course delivered to the defendants the said quantity of iron, which was by the defendants duly received, but they, although bound as aforesaid by the said contract to pay for the same, had neglected and refused so to do, although the term of credit allowed by the contract had expired.

The plea admitted that the defendants purchased from Brady, acting as broker for and on behalf of the plaintiff, the quantity of iron mentioned in the declaration; but alleged that at the time the purchase was made, the plaintiff, and said Brady, as such broker, repre-

sented the iron to be in perfect order and merchantable; whereas upon the removal of the iron from the plaintiff's store and the delivery thereof to the defendants at their store, it was discovered that a certain portion of it was not in good order, but was injured and damaged by water and rust, of all which the plaintiff forthwith had due notice. That the portion of the iron so injured and damaged was depreciated in value to an extent of at least \$32, and the defendants sustained a loss of at least \$32 upon the iron by reason of such injury. The defendants then alleged that they had always been ready to pay the amount of plaintiff's account less \$32, and had tendered the same *d deniers découverts*, with costs, before the return of the action, and they brought the money into Court with their plea.

From the evidence it appeared that the iron remained in the plaintiff's store for some time after the sale. When the defendants began to remove it, after a few loads had been taken off the top, it was found that a portion of it was damaged by rust. Brady, the broker, was examined and stated that he did not, as far as he could recollect, say anything as to the condition of the iron, because he understood it to be in good order. If he had known it to be in bad order, he would have stated it. Taylor, the defendants' salesman, went to examine the iron, but he testified that it was merely for the purpose of testing its *quality*, not examining its *condition*.

MONK, J. This is an action for \$448, the value of certain iron sold to the defendants, Mulholland & Baker. It appears that in August, 1865, a broker of the name of Brady was instructed by the plaintiff to sell a quantity of iron. Brady went to Mulholland & Baker, and asked them if they would buy it. They sent their salesman to examine it, for the purpose, as they allege, of testing the brand, and as the quality was found to be all right, a sale was concluded. After the iron had remained in the plaintiff's store for some time, the defendants sent for it. The first few loads were in good condition, but the third or fourth load began to look rusty, and it turned out that a considerable part of the iron was damaged by rust. The defendants remonstrated with Benson, had the iron surveyed, and

claimed either that the whole lot should be taken back, or that a deduction of \$32 should be made for what was unmerchantable. The plaintiff, however, refused to make any deduction whatever, and has now brought his action for the whole amount. The question comes up whether the sale was made under circumstances which exclude the defendants from claiming a deduction for unmerchantable iron. Thomson, the plaintiff's clerk, has been examined, and says he knew the iron was rusty. Brady, the broker, says he knew nothing about the iron being rusty, or he would have mentioned it. So we have a vendor employing a broker to sell a quantity of iron, and saying nothing to him about its being damaged. I am free to admit that if the defendants had bought this iron without the intervention of a broker, and had gone to examine it, it would have been for them to make a sufficient examination of it. But the plaintiff, knowing that the iron was rusty, employed a broker to sell it as in good condition, and as merchantable. Under these circumstances, although the defendants sent a clerk to examine it, yet as his examination is proved to have been merely for the purpose of ascertaining the quality, I think the plaintiff was bound to deliver the iron in good order, and that the defendants are entitled to the deduction which they claim. Their tender, therefore, is declared good and valid, and the plaintiff must pay the costs of the contestation.

A. & W. Robertson, for the Plaintiff.

Abbott & Carter, for the Defendants.

Nov. 30, 1866.

BOURDEAU v. GRAND TRUNK COMPANY.

Master and Servant—Damages—Injury caused by Negligence of Fellow-Servant.

Held, that an employee of a Railway Company has no action against the Company for damages, where the injury is caused by the negligence of a fellow-servant, while both are acting in pursuance of a common employment.

This was an action *in formâ pauperis* for \$8000 damages, brought by Siméon Bourdeau, a brakeman, formerly in the service of the Grand Trunk Railway Company.

The declaration set out that on the 15th of November, 1863, the plaintiff was employed on one of the trains of the defendants, and while near Island Pond, the cars, owing to a switch being misplaced, took the wrong track and came into collision with another train. The iron railing at the end of the car, where the plaintiff was attending to his duty, was crushed in by the force of the collision, and the plaintiff had both his legs broken. The plaintiff further alleged, that the accident occurred through the negligence of the Company's servants in not attending to the switch, and that the car on which he was standing had been declared dangerous before the date of the accident. That he was confined to hospital, and up to 23d Sept., 1864, the Company paid him \$15 per month, being half his ordinary salary, but they had then discontinued this allowance. That he was only thirty years of age, and was disabled for life, and prevented from earning a subsistence.

The defendants pleaded, first, the prescription of six months, and that the accident took place on a line of railway within the United States. But the plea on which the case turned was that the plaintiff had no action against the Company, being an employee at the time, and the accident being occasioned by the negligence of a fellow-employee.

MORRIS, J. This is an action of damages. The plaintiff was a brakeman, and while the train was near Island Pond, a collision occurred in consequence of a switch having been misplaced. The plaintiff was taken to hospital, and while he remained there the Company continued to pay him half his wages. Finally, he left the hospital of his own accord, and brought the present action. The defendants have pleaded the six months' prescription, and that the accident took place in the United States. But the Court is disposed to decide the case upon the ground, also raised by the pleadings, that the plaintiff cannot recover damages from his employers, the accident having occurred through the negligence of a fellow servant. The plaintiff in entering the service of the Company took the risk of these accidents upon himself. This is the law in England and the United States, and the same rule has been laid down here.

Médéric Lanctôt, for the Plaintiff.

Cartier & Pominville, for the Defendants.

[*NOTE*.—Compare *Fuller v. Grand Trunk Railway Company*, 1 L. C. L. J. 68. Several recent decisions in England on the same question will be found in "The Law Reports" for 1866. See *ante*, pp. 126, 178. Ed.]

COURT OF REVIEW.

Dec. 31, 1866.

HART v. O'BRIEN.

Ejectment—Act respecting Lessors and Lessees—Occupation by servant.

A gardener was engaged at \$30 per month, with the right of occupying a tenement free from rent as long as he should continue to hold the situation, on condition that he should be subject to dismissal at a month's notice. Being found incompetent, he received a month's notice to quit, and was then dismissed, but he refused to leave the tenement. An action being brought under the Lessors and Lessees' Act to eject him:—

Held, that the action was properly brought, the defendant being a lessee within the meaning of the Statute.

This was an ejectment case inscribed for Review, from the Circuit Court, Montreal. The action was instituted by the plaintiff under the Act respecting Lessors and Lessees, against the defendant, who had been his gardener, to eject him from the tenement he occupied, and which he refused to leave on being discharged. The declaration set up that at Montreal, on or about the 20th February, 1866, the defendant, representing himself to the plaintiff to be a skilful gardener, competent to perform all the functions of a first-class gardener, and especially to take care of and manage a green house, and the exotic and other plants and shrubs usually kept in green houses, was engaged at the rate of \$30 a month, and in further consideration that the plaintiff would let and lease to him, so long as he should remain in the plaintiff's employ as such gardener and no longer, a certain tenement and property of the plaintiff, to wit, a certain brick tenement two stories high, forming part of the building containing the plaintiff's coach house and stables. That the defendant entered the service and employ of the plaintiff as aforesaid, subject to the said monthly engagement to be determined and ended at the end of any month at the option of the plaintiff, upon his giving defendant

a month's notice of such option, and subject also to the right of the plaintiff under the law of the land to dismiss the defendant, in the event of his being incapable of performing the duties by him undertaken as aforesaid. The declaration further set out that the defendant entered upon his duties on the 1st March, 1866, and that the plaintiff, finding him incompetent, and that he had so mismanaged the greenhouse as to destroy and injure a large number of the most valuable plants, gave him notice in the latter part of September, that he would not require his services after 1st Nov. following, and had accordingly paid and dismissed him on that day, but that the defendant still remained in possession of the premises, and refused to leave. There was a further averment that the occupation of the tenement in question was worth the sum of \$10 per month. Conclusion, that by the judgment it be declared that the right of the defendant to the use and occupation of the premises ceased and determined on the 1st November, and that the defendant be ordered to leave the premises, &c., and in default of his so doing, he be expelled therefrom, and his furniture and effects *mis sur le carreau*, and the plaintiff placed in possession.

The defendant demurred on the ground that the case did not fall within the summary jurisdiction of the Court in ejectment. And he also pleaded an exception, setting up substantially the same agreement as that alleged by the plaintiff, but asserting that his engagement was for a year, and denying that he was incompetent, or that there was anything in the terms of his engagement which rendered him liable to be dismissed at a month's notice.

Upon these issues, the demurrer was heard and dismissed, and the parties thereupon proceeded to proof. A great deal of evidence was taken, chiefly as to the competency of the defendant as a gardener. This testimony was of a somewhat contradictory character, but appeared to show that the defendant was not competent to manage a large conservatory like that of the plaintiff. The month's notice to quit was also proved.

On the 6th Dec., 1866, MONK, J., in rendering judgment, said: There can be no question as to the jurisdiction of the Court. The defend-

ant occupied the plaintiff's house as his tenant, and the remuneration he gave for it was his services as gardener, which were partially paid for by that occupation; and his engagement having terminated by his dismissal, his lease terminated also, and he is now holding the premises against the will of the proprietor. As to the right to dismiss the defendant it rests upon two grounds: the agreement that he should leave after a month's warning, and his incompetency; and both these grounds are fully proved. This branch of the agreement is really not denied by the defendant—no general issue having been filed, but merely a demurrer and exception; and it is amply and explicitly proved by the plaintiff. The incompetency of the defendant for the management of the greenhouse and vinery, has been made equally plain. In fact there is really nothing upon which to rest a case for the defendant. No rent is given, but the defendant must leave the premises,—and the usual period, three days, will be allowed him in which to do so.

The defendant then inscribed the case for review, assigning the following reasons for the reversal of the judgment. 1st, The defendant was not alleged to be the lessee of the plaintiff, but his employee. 2nd, There was nothing in the declaration which disclosed the existence of a lease, or agreement equivalent thereto, as required by the statute under which the action was brought.

Judgment was rendered in review, Dec. 31.

BERTHELOT, J., stated the facts and proceeded to say:—The principal question is whether this action was properly brought under the act respecting lessors and lessees, C. S. L. C., Cap. 40. The 16th section of this act says that "persons holding real property by permission of the proprietor, without lease, *shall be held to be lessees*, and bound to pay to the proprietor the annual value of such property, and their term of holding shall expire on the first day of May of each year, &c., and the person so in occupation shall be liable to ejectment for holding over, &c., or for any of the causes mentioned in this act." In section 1, these causes are enumerated, and sub-section 4 states that the lessor has the right to recover possession of the property

leased, when there is a cause for rescision of the lease, &c., or according to the 16th section when there is no lease. Taking these sections together, I think the plaintiff was justified in bringing his action under this act to eject the defendant, when the latter refused to leave after receiving a month's notice.

SMITH, J. It is evident that the relation of landlord and tenant existed between the parties under the 16th section of the act. This settles the whole case. The defendant's engagement and tenancy having terminated at the expiration of the month's notice, he must go out of the premises.

MORR, J., concurred.

Judgment confirmed.

Abbott & Carter, and L. N. Benjamin, for the plaintiff.

Senecal & Ryan, for the defendant.

SUPERIOR COURT.

Dec. 26, 31, 1866.

ROYAL INSURANCE CO. v.

KNAPP AND GRIFFIN.

*Capias founded on illegal holding of property.
—Bonds stolen in a Foreign Country.*

Held, that an affidavit for *capias* alleging that the defendants illegally hold, in Lower Canada, property of the plaintiffs, illegally obtained, is sufficient, and that it is of no importance whether the property was stolen or illegally obtained in Canada or in a foreign country.

The defendants, Frank Knapp and James Griffin, having been arrested under a *capias ad respondendum*, moved to quash. The *capias* was issued at the instance of the Royal Insurance Company, a body politic and corporate, "carrying on the trade and business of insurance at Montreal and elsewhere." The affidavit on which the writ issued was made by H. L. Routh, the legal agent and attorney of the Company, and set out that the defendants "are personally and jointly and severally indebted to the plaintiffs in a sum exceeding £10 stg., to wit, in the sum of \$214,000 U. S. currency, equal to \$155,000 Canada currency, being the amount of the several bonds, coupons of bonds, and securities of the Government of the United States of America,

the property of the said plaintiffs, which they the said defendants illegally obtained possession of on the 10th December, and which they now illegally hold in their possession and under their control at the city of Montreal:

[Here follows the description of the bonds and securities.]

"That deponent hath personally demanded from the defendants the restoration of the said bonds and certificates, but they the defendants have wholly refused to restore the same or any part thereof to the plaintiffs, and they the defendants still retain and secrete the same from the plaintiffs, so that the plaintiffs are wholly unable to revendicate or attach said bonds and certificates.

"That the deponent is credibly informed, hath every reason to believe, and doth in his conscience believe that the said defendants are now immediately about to leave the Province of Canada, and abscond therefrom with intent to defraud their creditors and the Royal Insurance Company in particular, and moreover have secreted and are secreting their property with intent to defraud their creditors, and the said Royal Insurance Company, the plaintiffs in this cause, in particular.

"And for reasons of his belief the deponent avers: That the defendants are citizens and subjects of the United States of America, and are merely here in the city of Montreal temporarily; that they have no domicile in Canada, nor do they own any property in Canada, either personal or real; that deponent hath been informed by John S. Young and John Jourdan, both of New York, police detectives, that the defendants are professional thieves, and immediately about to leave the Province of Canada, without any intention of returning thereto; that deponent hath moreover been informed by Anthony B. McDonald, insurance agent, of New York, that the defendants are possessed of the aforesaid bonds and securities, which they refuse to give up to plaintiffs, or to deponent as plaintiffs' agent, and that the defendants are secreting said bonds and securities, and secretly endeavoring to sell and dispose of the same, and convert the proceeds to their own use and advantage, and that unless the said defendants are arrested under a writ of *capias ad resp.*, the said bonds

and securities and the said debt (the value thereof as aforesaid) will be wholly lost to the plaintiffs.

"The deponent saith that without the benefit of a writ of *cap. ad resp.* against the bodies of the defendants, and a writ of attachment, *saisie-arrière*, for the purpose of seizing and attaching such moveable estate, and effects as may be in the possession of the defendants, the plaintiff will lose said bonds and certificates and said debt (the value thereof as aforesaid) or sustain damage."

This affidavit was made Dec. 20. The defendants appeared separately, and (Dec. 26) severally moved to quash. The motions, which were identical in terms, were to the following effect:

"That the writ of *cap. ad resp.* issued in this cause be set aside and quashed with costs, and the said defendant released from the custody of the Sheriff for the following amongst other reasons:

"1st. Because the affidavit does not disclose any legal and sufficient grounds of debt against the said defendants for which a writ of *capias* could by law be issued.

"2nd. Because it appears from the said affidavit that the said bonds and securities alleged to be the property of the plaintiffs, were obtained at New York on the 10th December instant, and by reason thereof, notwithstanding the illegal holding thereof at Montreal, no writ of *capias* can be issued for or by reason of such illegal holding, because the cause of action did not accrue or arise, and is not alleged to have accrued or arisen, within this district or within this Province.

"3rd. Because even if the said bonds were illegally obtained and held by the defendants, the defendants cannot be held indebted to the plaintiffs in the value of said bonds or securities as alleged in the said affidavit, and were only liable on a special action in damages (which damages are not alleged), or criminality, in case a criminal offence was committed.

"4th. Because the said affidavit and the grounds and reasons in said affidavit set up, are wholly insufficient, and ought so to be declared, and the affidavit set aside, and writ quashed."

Mr. A. Robertson, Q. C., for the defendant Griffin. The motion to quash is based on the ground that it is not disclosed in the affidavit where the cause of action arose, and because it appears indirectly from the reasons stated in support of the affidavit that the cause of action arose in New York, out of the Province of Canada. Now, it was held by the Court of Appeals in *Bottomley and Lumley*, 13 L. C. R. 227, that a party arrested under a *capias* will be discharged, if it be proved that the cause of action arose in a foreign country. The illegal holding of property in Canada is not ground for a *capias*. The plaintiffs should have seized their property by action *en revendication*, or brought an action of damages, or instituted a criminal prosecution.

Mr. Kerr, for the defendant Knapp. The affidavit ought to disclose where the debt was contracted, in order that the Court may be certain that the cause of action, that is, the whole cause of action, arose in Canada. In the present case, so far from the affidavit disclosing that the cause of action arose here, it appears indirectly that the cause of action arose in the State of New York, where the alleged *délit*, the abstraction of the bonds, was committed. The mere holding of the bonds at Montreal may be ground for an action, but not for a *capias*.

Mr. Bethune, Q. C., for the plaintiffs. The defendants would have brought their pretensions before the Court in a more correct form by a petition on which the parties could go to proof. They cannot succeed on a mere motion alleging informality in the affidavit, because the affidavit shows distinctly that the cause of action, namely, the illegal holding of the plaintiffs' property and the refusal to give it up, arose in Montreal. *Bottomley and Lumley* is not in point; for in that case the debt was for goods purchased in England. But in this case the affidavit alleges that the defendants, professional thieves, got possession of the bonds on a certain day, that they have got them in their possession here at Montreal, that the deponent, Mr. Routh, representing the plaintiffs who are described as doing business at Montreal, has personally demanded possession of the bonds, but that the defendants have failed to restore them, and have

secreted them, so that the plaintiffs cannot attach or revendicate them, and all they claim is the value of them, which value is sworn to be so much in U. S. currency, equivalent to a certain amount in Canada money. Are the plaintiffs to be told that under these circumstances they must take out a *saisie-revendication* when the facts sworn in the affidavit show that this remedy would be wholly illusory? As for a criminal prosecution, it could not be sustained under the law as it stands.

Mr. *Carter, Q. C.*, also for the plaintiffs. The real cause of action is the illegal holding of the plaintiffs' property here, and wherever the defendants might transport this property, the plaintiffs would have a perfect right to follow them, and claim the property from them by suit. The removal of the property to Montreal justifies the plaintiffs in considering such removal and illegal holding in Montreal as a fresh and sufficient cause of action arising in Montreal.

Mr. *Robertson*, in reply. The case appears to me to lie within a narrow compass. Was it not for the plaintiffs to show affirmatively where the bonds were obtained? Their omission to show this in the affidavit is sufficient ground for quashing the *capias*.

Judgment was given Dec. 31.

BERTHELOT, J., stated the substance of the affidavit and motion, and continued: The defendants contend that the affidavit is defective, because it does not disclose a sufficient ground of indebtedness, and, further, say that it appears from the affidavit that the bonds were obtained in a foreign country, and even if held here, such holding is not sufficient ground for a *capias*. It is not on a motion to quash that these pretensions can be examined. I have always been of opinion that an affidavit must be radically defective to be set aside on a motion to quash. The Statute has pointed out the proper course to be adopted, namely, by petition and proof. I am of opinion that the affidavit is sufficient. What renders the defendants liable here is the fact of their being found here with the property in their possession. I have examined all the cases cited, and I find none in contradiction with the decision at which I have arrived. The owner of stolen property has a right of

action against the thief wherever he finds him with the stolen property in his possession. In the present case it is not material whether the property was stolen here or at New York. Both motions must be dismissed. [His Honor referred in the course of his remarks to *Bottomley v. Lumley*, 13 L. C. R. 227; *Cameron v. Brega*, 1 L. C. L. J. 65; *Dumaine v. Guillemot*, 6 L. C. R. 477; *Redpath v. Giddings* (in which the *capias* issued for damages, and a motion to quash was dismissed by *Smith, J.*); and also to Art. 802 of Draft of Code Civil Procedure, suggested in amendment.]

S. Bethune, Q. C., and *E. Carter, Q. C.*, for the plaintiffs.

A. & W. Robertson, and *W. H. Kerr*, for the defendants.

REPORTING EXTRAORDINARY.

In our Courts we are occasionally favored with judgments in which the facts are presented in rather romantic dress. A judge of a poetic or humorous turn may now and then be seduced into highly colored narratives, by the strangeness of the facts presented in evidence; and a reporter might not be without some excuse for reproducing the romantic statement. But in the neighboring republic, the official reporter of the Supreme Court needs no such incentive to fill his volumes with the rhetorical flights of the shilling novel. From a notice in the *American Law Review* of the three volumes recently issued, we find that Mr. Wallace has hit upon a new and peculiar method of reporting, which will be best understood by a few illustrations.

In one case, *Burr v. Duryee* nineteen pages and nine pictures are devoted to the statement of the case. The arguments are reported in fifteen pages with twelve cuts. In the reports of arguments, even the most absurd flights of rhetoric indulged in by counsel are occasionally preserved. In the case of the *Circassian* for instance, there occurs the following:—
“ We are engaged in putting down a vast awful and wicked rebellion. We have had no countenance from the British Government, and have been actively and constantly thwarted by the cupidity and wealth of British sub-

jects. But the rebellion *will* be suppressed." In another case, having occasion to say that the question was whether or not the parents were married, he does it as follows:—"This was a narrative sufficiently touching, and quite circumstantial no doubt. But was it true? Was the case one of a marriage solemnised in form, and kept a secret for five-and-twenty years,—a romance, perhaps, discovered only by relatives not enriched, to be a

reality,—perhaps a *misalliance* simply? Or was it one of those less regular relations,—*mutato nomine*, of every day, and out of which men elaborate such infinite vexation for themselves and others from the pure element of the affections—misdirected?" The reports, according to the *Law Review*, abound in fanciful and extravagant passages, of which the above are an example.

BANKRUPTCY.

We begin with the new year to furnish a tabular statement of bankrupt notices, compiled from the Official *Gazette*. We had proposed to include a table of applications for discharge and confirmation of discharge, but found that it would occupy much valuable space, and as the applications are principally to be made in

Upper Canada, we doubted the advisability at present of excluding more interesting matter for the sake of inserting the applications for discharge. Should we, however, receive an intimation from any considerable number of our readers of their wish to have these notices, or those for Lower Canada, in tabular form, we shall begin to publish them in the next issue.

ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Brown, Francis H.	Mariposa.	S. C. Wood.	Lindsay.	Jan. 4
Barbeau, François.	St. Rémi, C. E.	T. Sauvageau.	Montreal.	Jan. 8
Booth, Henry, Jun.	St. Catherine.	J. R. Armstrong.	St. Catherine.	Jan. 4
Brown, John & Hector.	Manilla.	Richard Edwards.	Manilla.	Jan. 17
Clark, Thomas.	Hamilton.	J. J. Mason.	Hamilton.	Jan. 2
Côté, Césaire.	Montreal.	T. S. Brown.	Montreal.	Jan. 10
Couture, Pierre.	Quebec.	Wm. Walker.	Quebec.	Jan. 11
Davison, Robert.	Turnberry.	Samuel Pollock.	Goderich.	Jan. 8
De Laparatz, Louis.	Montreal.	T. S. Brown.	Montreal.	Jan. 16
Dudenhofer, William.	East Atherly.	James Holden.	Whitby.	Jan. 10
Griffith, Henry.	Hamilton.	W. F. Findlay.	Hamilton.	Jan. 8
Gibbs, George.	Guelph.	Thos. Saunders.	Guelph.	Jan. 10
Hodgeon, Jonathan.	Mariposa.	S. C. Wood.	Lindsay.	Jan. 10
Johnson, Chauncey, & E. P.	L'Original.	J. O. Gates.	L'Original.	Jan. 14
Kerby, Joseph T.	Montreal.	A. B. Stewart.	Montreal.	Jan. 16
Larocque, C. H.	St. George de Henryville.	T. Sauvageau.	Montreal.	Jan. 4
Miller, Walter.	Markham.	A. Barker.	Markham.	Jan. 10
Mathieu, Hilaire.	La Presentation.	T. Sauvageau.	Montreal.	Jan. 16
McKercher, John.	Reach.	James Holden.	Whitby.	Jan. 16
Orr, Wm. E. E.	Dunham.	T. S. Brown.	Montreal.	Jan. 2
Perrault, Zéphirin.	Deschambault.	A. B. Stewart.	Montreal.	Jan. 16
Percy, James A.	Cobourg.	E. A. Macnachten.	Cobourg.	Jan. 15
Reid, James, Jun.	Lennoxville.	John Whyte.	Montreal.	Jan. 10
Raimond, Joseph.	St. Rémi.	T. Sauvageau.	Montreal.	Jan. 8
Senecal, J. B., & Fils.	Montreal.	T. S. Brown.	Montreal.	Jan. 16
Sutherland, Jas., of Mitchell & Co.	Toronto.	Jas. McWhirter.	Woodstock.	Jan. 2
Tyler, Caldwell J.	Guelph.	Thos. Saunders.	Guelph.	Jan. 9

WRITS OF ATTACHMENT.

PLAINTIFFS.	DEFENDANTS.	PLACE.	DATE.
F. G. Beckett, H. Beckett, sen., and H. Beckett, Jun.	David Pease and G. Cumming	Sarnia.	Jan. 2
Robert Forster, Arch. Molr, and James Molr.	James N. Henry.	London.	Jan. 5
John Garrett.	Hilry Howard.	Hamilton.	Jan. 4
John Johnstone Clark.	Alex. Stewart.	Stratford.	Jan. 8
Andrew T. Wood and Matthew Leggatt.	Andrew Patton, A. M. Patton and C. G. M. Dralake.	St. Thomas.	Jan. 8

The Lower Canada Law Journal.

VOL. II. MARCH, 1867. No. 9.

THE INSOLVENT ACT.

When the Insolvent Act of 1864 came into force, it was thought that the great number of debtors who took advantage of it was explained by the fact, that there were many traders throughout the country, with old liabilities clinging to them, to whom the new law afforded an escape from their embarrassments. Unfortunately, however, the list of bankrupts shows no falling off, for our table this month includes eighty-eight assignments and seven attachments.

Other causes are evidently at work to keep up the steady march towards insolvency. The chief of these perhaps is that debtors find in the Insolvent Court a too ready means of freeing themselves from the consequences of imprudent speculation, extravagance, or careless management of their affairs. Another reason for the crowd of bankrupts probably is, that few small traders in this Province connect the idea of insolvency with disgrace or dishonor. There can be no doubt that very many of the failures which are daily taking place might be avoided, by industry and careful management, and probably would be, if traders generally had a more scrupulous sense of commercial integrity.

It is tolerably certain, also, that creditors are afraid to press their debtors as in former times. Costs incurred in obtaining judgments being unprivileged, creditors naturally fear to incur legal expenses in prosecuting claims which may be got rid of by an assignment.

Some discussion has recently taken place in the daily press as to the benefits derived from the Act. One writer denounces the law as favoring the dishonest trader, and opening the door to barefaced fraud. This attack has been met by one of the official assignees, who seeks to show that the dishonest trader does not find his path through the Insolvent Court very pleasant and free from thorns. A leading Queen's Counsel has also written several letters on the subject, showing that our Act lacks some of the provisions for the punish-

ment of fraud contained in the English law. We do not propose to enter upon the consideration of this subject at present, but merely append an important decision which we find in our Upper Canada legal contemporary, and which is understood to have caused some dissatisfaction among creditors in that quarter.

IN RE LAMB, AN INSOLVENT.

Insolvent Act of 1864—Application by Insolvent for discharge—Fraudulent preference—Neglect to keep proper books of account—Measure of punishment.

It appeared, on an application by an insolvent for his discharge under the Insolvent Act of 1864, that he had within three months before his assignment paid one of his creditors in full under such circumstances as were considered to amount to a fraudulent preference, and had neglected to keep proper cash books or books of account suitable to his trade. The County Judge granted a discharge suspensively, to take effect four months after the order made.

Upon an appeal from this order by a creditor, the judge in Chambers thought that the judge below had acted with extreme leniency, and though he would not interfere with the order that he made, dismissed the appeal, but without costs.

Remarks upon the breach of duty in not keeping proper books of account, which should be severely punished.

The requirements of the act on debtors asking for discharge should be peremptorily insisted on.

[Chambers, Toronto, Nov. 27, 1866.]

The facts of this case are fully set out in the petition of the creditors of the insolvent, who appealed against the order made by the judge of the County Court of the United Counties of Lennox and Addington, granting to the above insolvent a discharge suspensively, to take effect on 1st February, 1867.

The petition stated :

That the above named insolvent, Thomas Lamb, on the first day of June, in the year of our Lord 1865, made an assignment under the Insolvent Act of 1864, to Henry Thorp Forward, of the Town of Napanee, in the County of Lennox and Addington, Esquire.

That the petitioners were at the time of the said assignment, and previously thereto, and have ever since been, and still are creditors of the said insolvent to a large amount, and duly proved their claim against him before the said assignee within the time and in the manner prescribed by the said Act.

That the insolvent gave notice of his intention to apply to the judge of the County Court of the Counties of Lennox and Addington on the tenth day of August, A. D. 1866, for a discharge under the said Act; and on that day he presented to said judge in his Chambers, in the Town of Napanee, a petition for such discharge by his attorney *ad litem*, which said petition was in the words and figures following, that is to say:

"INSOLVENT ACT OF 1864.

"In the County Court of the Counties of Lennox and Addington.

"*In the matter of Thomas Lamb, an insolvent.*

"The petition of Thomas Lamb, of the Town of Napanee, in the Counties of Lennox and Addington, Merchant,

"Humbly sheweth,—That your petitioner made an assignment under the Insolvent Act of 1864, to Henry T. Forward, Esquire, official assignee, which assignment bears date the first day of June, in the year of our Lord one thousand eight hundred and sixty-five.

"That one year has elapsed from the date of the said assignment, and your petitioner has not obtained from the required proportion of his creditors a consent to his discharge.

"That your petitioner has given notice of his intention to apply for his discharge according to the provisions of the said act, and has complied with all the provisions and requirements of the said act.

"Your petitioner therefore prays that he may obtain an absolute and final discharge under the above mentioned act.

"Dated at Napanee this 10th day of August, A. D. 1866."

That on the said tenth day of August, at the time of the presentation of the said petition, the petitioners appeared, by William Albert Reeve, of the Town of Napanee, Esquire, their counsel, and opposed the prayer of the said petition. Petitioners examined the

said insolvent upon oath before the said judge.

That after said insolvent had been so examined and had been cross-examined by his attorney *ad litem*, the said application was adjourned until the tenth day of September, A. D. 1866, to enable the petitioners to produce certain witnesses for the purpose of examining them before the said judge on the said application, and upon the said tenth day of September the said William Albert Reeve did produce certain witnesses before the said judge, and examined them on behalf of the said petitioners touching the affairs of the said insolvent, which said witnesses or most of them were cross-examined by the attorney *ad litem* for said insolvent. [A copy of the examinations of the insolvent and the witnesses was annexed, but the matter of them is sufficiently stated hereafter.]

That after hearing the evidence and the arguments of counsel for the said insolvent, and for the petitioners and other creditors of said insolvent, the said judge of the County Court of the County of Lennox and Addington, on the sixth day of October, A. D. 1866, in presence of counsel aforesaid, delivered his judgment in writing upon the matter of said application as follows:

"In the matter of Thomas Lamb, an insolvent.

"The petitioner made his assignment on 1st June, 1865, and having been unable to obtain a composition and discharge from his creditors, now seeks for an order from the court granting his discharge.

"The prayer of his petition is opposed by several creditors on the grounds of fraudulent retention or concealment of part of his estate, prevarication and false statements in examination, fraudulent preference of particular creditors, and lastly, of deficient books of account.

"On hearing, the parties and attentively considering the facts disclosed on the insolvent's examination before me, I see no reason to believe that he has fraudulently concealed or retained any part of his effects, nor do I think that he was guilty of any prevarication or false statements; on the contrary the insolvent's conduct since his assignment seems to me to be fair and honest, and not liable to the censures attempted to be cast upon it.

"There are, however, two charges made against the insolvent respecting his conduct before the assignment to which no answer appears to be given. It is shown that in the month of April, 1865, within less than three months before the assignment, the insolvent being indebted to his shopman, McCan, in \$300 for wages and borrowed money, gave him promissory notes of his customers to the amount of \$400, in full satisfaction of the debt. There can be no doubt that this transaction was wholly illegal and amounted to a fraudulent preference; however natural it may be for a man pressed by his servant, who was also his creditor, for wages and loans, to satisfy such a claim in the way the insolvent did, yet the provisions of the Insolvent Act of 1864 clearly point out that such a payment is a fraud upon the other creditors.

"The second charge made against the insolvent is, that he did not keep a cash book nor other sufficient books of account suitable to his trade, which is not denied by the insolvent.

"Under these circumstances, although I do not consider with the creditors, that the insolvent should never be discharged at all, yet it seems right that some penalty should be inflicted in consequence of the faults committed by him in the above mentioned instances. I therefore order that his discharge shall be suspended until 1st February, 1867, and will sign an order granting his discharge suspensively to take effect on that day."

That in accordance with the said judgment said judge granted and signed an order bearing date on the said sixth day of October, A D. 1866, as follows:

"INSOLVENT ACT OF 1864.

"In the matter of Thomas Lamb, an insolvent.

"Whereas Thomas Lamb, of the Town of Napanee, in the County of Lennox and Addington, Merchant, made an assignment under the Insolvent Act of 1864, bearing date upon the first day of June, in the year 1865; and whereas after the expiration of one year from the date of the said assignment, having given due notice thereof, and having in all respects complied with the provisions of the said Act, the said Thomas Lamb did on the tenth day of

August, in the year one thousand eight hundred and sixty-six, present his petition to me, James Joseph Burrowes, Judge of the County Court of the County of Lennox and Addington, praying for his discharge under the said act, and whereas the said insolvent has undergone a full examination before me touching his affairs.

"Now therefore I, the said judge, after hearing the said insolvent and such of his creditors as objected to his discharge, and all the evidence adduced as well on the part of the said creditors as of the said insolvent, and having duly considered the said allegations and proofs, do hereby according to the form of the said Insolvent Act grant the discharge of the said Thomas Lamb suspensively, and do order that such discharge shall be suspended until and shall go into operation and have effect upon and after the first day of February, in the year one thousand eight hundred and sixty-seven.

"Witness my hand," &c.

The petitioners being dissatisfied with the said order and decision, made an application to a judge of one of the Superior Courts of Common Law, presiding in Chambers in Toronto, to be allowed to appeal from the said order and decision, and on the seventh day of November, A. D. 1866, an order was granted by the Chief Justice of Upper Canada, allowing the petitioners to appeal to one of the judges of the Superior Courts of Common Law in Chambers from the said order.

That since the allowance of the said appeal, and within five days therefrom, the petitioners gave security in the manner required by the said Insolvent Act of 1864, that they would duly prosecute the said appeal, and pay all costs.

The petitioners therefore prayed that the said order and decision of the judge of the County Court of the County of Lennox and Addington might be revised, and the same reversed, and the discharge of the said insolvent, Thomas Lamb, under the said act might be absolutely refused, or that such order be made in the matter as should seem meet.

Osler for the appellants.

Holmsted for the insolvents.

No cases were cited by either party.

HAGARTY, J.—The learned judge below considered the insolvent's conduct to be reprehensible in not keeping proper books of account, and suspended his discharge for six months. I do not think it wise to interfere with the exercise of such a discretion on the part of a judge who has heard the examination of the insolvent, and been cognizant of the various proceedings in the case, except in a very clear case in which the appellate jurisdiction is necessarily invoked to prevent an undoubted injustice.

I think that the learned judge acted with extreme leniency, and possibly took a milder view of the bankrupt's misconduct than I should have done, judging wholly from the papers before me. Had he, with his superior opportunities of forming a correct opinion, passed a much more severe sentence, I should certainly not interfere with it on the insolvent's application. I think the insolvent's neglect to keep proper books a most serious breach of duty, causing great possible injury to his creditors, and tending to raise strong distrust of his integrity. The evidence of his being a very illiterate man suggests the only possible excuse, and weighed, I presume, with the learned judge. It might perhaps be said that it was not very prudent for his creditors to trust a man so unfit for the conduct of business or the keeping of accounts with such large quantities of goods on credit. I do not differ from the learned judge's view as to the alleged preference. As to the neglect to keep proper books, I think it would be well always to punish such a breach of duty in a severe and exemplary manner.

We have in this country in our legislation done everything to favour debtors and render the escape from liability as easy as possible to them. It will be well at all events that the very easy requirements of the Insolvent Act on debtors asking for their discharge should be peremptorily insisted on, and proper punishment awarded to any breach of the trader's duties in conducting his business.

I gladly avail myself of the power given me by sub-sec. 6 of sec. 7 of the act, and, while feeling bound to dismiss the appeal, do so without costs.

I think Mr. Lamb's creditors had just

ground, for feeling indignant at his conduct and opposing his discharge, and endeavouring to have some punishment inflicted upon him.

INSTRUCTIONS AS TO COSTS.

Some difference of opinion has recently arisen respecting the propriety of a judge instructing a jury what damages will carry costs. It has been customary in England for a judge to refuse to instruct a jury on this head. Chief Justice Erle, however, in the recent case of *Athol v. Seman*, adopted the contrary course, and gave the information asked for. The *Solicitors Journal* thinks that the best way is to leave the jury in the dark as to the exact consequences of their verdict. This is also the opinion expressed by Baron Bramwell, in another recent case, *Kelly v. Sherlock*, Law Rep. 1 Q. B. p. 691. The report informs us that the jury having retired, returned into Court, after an hour and a quarter, saying they could not agree; and one of them inquired what verdict would carry costs. The learned judge (Baron Bramwell) replied, that it was a question which he had discussed with the late Lord Campbell, and the conclusion come to was, that the question was one which ought not to be answered by the judge. It was for the jury to say, if they found for the plaintiff, to what extent he had been damaged, irrespective of the effect the verdict might have on the question of costs. Otherwise they might actually defeat the law. After some further discussion, a juror asked the learned judge to repeat what he had said respecting costs. On which the learned judge said: "The law supposes that you will give such damages as you think are really equivalent to the injury sustained by the plaintiff. And it says, in certain cases, for the prevention of frivolous actions, if the plaintiff does not recover a certain amount, he shall try his action at his own expense. Now it seems to me that you ought to say to yourselves, 'we will give a certain amount,' but the amount ought not to be regulated by its effect upon the costs. Because it is manifest, if you say we will give a certain sum in the hope it will carry costs, that you thereby defeat the object of the law."

POST OFFICE REGULATIONS.

The *Canada Gazette* of Feb. 23rd contains some instructions to postmasters which are of general interest. A letter is considered prepaid only when the whole postage is prepaid. If only partially prepaid the letter is charged as though sent unpaid, less the amount of stamps on it. Thus, a double letter with a five cent stamp on it is charged *nine cents*, as the postage on it, if sent unpaid, would have been fourteen cents.

The instructions relative to book manuscript and printer's proof may be of service to some of our readers. Authors and others sending book manuscript to printers or publishers, are entitled to have it transmitted by mail at the printed matter rate of one cent per ounce. Proofs sent from printing offices to authors for correction also pass at the rate of one cent per ounce, and may be returned corrected at the same rate.

NOTICES OF NEW PUBLICATIONS.

THE LAW MAGAZINE AND LAW REVIEW.—London, Butterworths. November, 1866, and February, 1867. The contents of the last two numbers of this legal quarterly are full of interest. Among the articles in the November number is one on the case of George William Gordon; another on Judicial Statistics by C.S. Greaves, Esq., Q.C., and a third on the Rank of Queen's Serjeant. The February Number contains an extremely interesting paper on Sir Edmund Saunders and Mr. Serjeant Williams, a notice of the late Sir J. L. Knight Bruce, and another paper on Criminal Procedure by Mr. Greaves, Q. C.

THE AMERICAN LAW REVIEW, January, 1867. —Among the papers in this valuable quarterly is one on Luther Martin, the friend and zealous advocate of Aaron Burr. Martin is a striking instance of the transient nature of forensic fame. Although his very name is now almost forgotten, he was for nearly half a century the most talked of man in Maryland, of which he was for thirty years the Attorney General.

THE AMERICAN LAW REGISTER, January, 1867.—D. B. Canfield & Co., Philadelphia. One of the editors of this monthly Law Maga-

zine is the Hon. I. F. Redfield, author of "The Law of Wills." In a note to one of the Reports, the Hon. Mr. Redfield, referring to the preparation of opinions by judges, remarks. "We have often regretted that our Courts of last resort had not more leisure to prepare their opinions in a similarly satisfactory manner. But it is the curse of our day and generation, that our ablest and most useful men ruin themselves, and fail to serve the public with any acceptance, just because they are pushed beyond their strength and ability; and by attempting to do ten times as much as they can do well, really fail of doing anything to any purpose." This may be very true, but on the other hand abundant leisure is not always productive of careful and painstaking opinions, as some of our readers have probably had an opportunity of observing.

LAW RESPECTING THE BAR OF LOWER CANADA, WITH THE BY-LAWS OF THE GENERAL AND LOCAL COUNCILS.—This a pamphlet of over 120 pages, containing the Act of last session respecting the Bar, and also the by-laws of the General Council, and of the sections of Montreal, Quebec, Three Rivers and St. Francis. The compilation, which will be found very convenient for reference, has been made, we understand, by Mr. Gonzalve Doutre, Secretary of the General Council, who has evidently bestowed great labor and attention upon the task.

CANADIAN SCENERY—DISTRICT OF GASPE.—Montreal, R. Worthington. Those who have any acquaintance with Gaspé and its romantic scenery, will hail with pleasure the appearance of this work. It contains about twenty large sized chromo-lithographs from photographs taken by the author, Mr. Pye, a resident of Gaspé, who, with laudable energy, has surmounted all the obstacles incident to the preparation and publication of the work. The plates are accompanied by letterpress, descriptive of the views and of the District generally, with a full account of the various great fishing establishments. All the spots favored by nature and worthy of a visit from the tourist are carefully noted. The work, which is handsomely printed at Mr. Lovell's establishment, forms a very valuable addition to Canadian literature.

BANKRUPTCY—ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Allingham, Richard.....	Napanea	W. S. Robinson..	Napanea.....	Jan. 17th.
Anderson, William.....	Township of Wallace	Thos. Miller.....	Stratford.....	Feb. 18th.
Aubertin, Jérémie.....	St. J. Bte. de Rouville.	T. S. Brown.....	Montreal.....	Feb. 7th.
Baker, Geo. Alfred.....	Galt, C. W.....	Alex. McGregor..	Galt.....	Jan. 28th.
Barre, Louis.....	Lachine.....	A. B. Stewart.....	Montreal.....	Jan. 18th.
Barron, James L.....	Stratford.....	Thos. Miller.....	Stratford.....	Feb. 9th.
Baxter, Lewis.....	Township of Ancaster	W. F. Findlay.....	Hamilton.....	Jan. 26th.
Béchar, Joseph.....	St. Pat. de la Riv. du Loup	Wm. Walker.....	Quebec.....	Feb. 6th.
Benoit, Pierre.....	St. Almé, C. E.....	T. S. Brown.....	Montreal.....	Feb. 13th.
Bonhomme, Wilbred.....	Quebec.....	A. Fraser.....	Quebec.....	Jan. 17th.
Boomhoyer, Levi E., individ. and as partner of Stoakes & Boomhoyer	Lacolle.....	A. B. Stewart.....	Montreal.....	Feb. 5th.
Bowman, William L.....	Waterloo, C. W.....	H. F. J. Jackson..	Berlin, C. W.....	Feb. 11th.
Brett, James.....	Toronto.....	W. T. Mason.....	Toronto.....	Feb. 16th.
Brown, Robert, individually and as partner of W. & R. Brown.....	Stratford.....	Thos. Miller.....	Stratford.....	Jan. 28th.
Brown, Samuel.....	Township of Emily	S. C. Wood.....	Lindsay.....	Jan. 24th.
Bury, George, individually and as partner of Bury & Hayes.....	Montreal.....	A. B. Stewart.....	Montreal.....	Feb. 7th.
Carpenter, George Durham.....	Township of Saltfleet	J. J. Mason.....	Hamilton.....	Feb. 4th.
Charity, James Henry.....	Chatham, C. W.....	Richard Monck..	Chatham.....	Feb. 16th.
Cowan, Andrew.....	Town of Uxbridge, C. W.	H. T. Johnstone..	Uxbridge.....	Jan. 22nd.
Crawford, Thos.....	Township of Emily	S. C. Wood.....	Lindsay.....	Feb. 5th.
David, Maxime Olivier.....	St. Johns, C. E.....	Wm. Coote.....	St. Johns.....	Jan. 26th.
Décooteau, Joseph.....	South Somerset	Wm. Walker.....	Quebec.....	Feb. 18th.
Dillen, David M.....	Sherbrooke.....	A. M. Smith.....	Sherbrooke.....	Feb. 18th.
Douglas, Thomas S.....	Montreal.....	A. B. Stewart.....	Montreal.....	Feb. 20th.
Dutton, Samuel.....	London.....	L. Lawrason.....	London.....	Feb. 2nd.
Easton, John.....	Hamilton.....	D. B. Chisholm..	Hamilton.....	Feb. 5th.
Flaws, Robert.....	St. Mary's.....	Thos. Miller.....	Stratford.....	Feb. 13th.
Forsyth, Ezekiah C.....	Woodstock.....	Jas. McWhirter..	Woodstock.....	Jan. 26th.
Frechette, J. Bte.....	Quebec.....	Wm. Walker.....	Quebec.....	Feb. 11th.
Freer, Boyd & Co.....	Montreal.....	A. B. Stewart.....	Montreal.....	Feb. 16th.
George, Alpheus.....	Sherbrooke.....	A. M. Smith.....	Sherbrooke.....	Feb. 7th.
Goodfellow, Adam.....	Collingwood.....	John Tyson.....	Collingwood.....	Feb. 4th.
Grenier, Louis J.....	Sorel.....	A. B. Stewart.....	Montreal.....	Feb. 18th.
Henry, James N.....	St. Thomas, C. W.....	J. Ardagh Roe.....	St. Thomas.....	Feb. 11th.
Hookin, William.....	Guelph.....	E. Newton.....	Guelph.....	Jan. 18th.
Hookin, William, & Hookin, Samuel	Guelph.....	E. Newton.....	Guelph.....	Jan. 18th.
Hudson, Firmin.....	Quebec.....	Abm. Hamel.....	Quebec.....	Jan. 24th.
Jagoe, William.....	Hamilton.....	J. J. Mason.....	Hamilton.....	Feb. 4th.
Johns, John.....	London.....	Thos. Churcher..	London.....	Jan. 30th.
Kieran, James.....	Guelph.....	Thos. Saunders..	Guelph.....	Feb. 4th.
King, William.....	Hamilton.....	J. J. Mason.....	Hamilton.....	Jan. 28th.
Labelle, Jean Baptiste.....	St. Janvier.....	T. S. Brown.....	Montreal.....	Feb. 6th.
Labossière & Son, Joseph.....	St. Valentine.....	Francis George.....	Montreal.....	Jan. 22nd.
Lamoureux, Léandre.....	Montreal.....	T. Sauvageau.....	Montreal.....	Feb. 21st.
Laporte, Victor.....	Ottawa.....	Francis Clemow..	Ottawa.....	Feb. 4th.
Larivée, Louis.....	Montreal.....	T. Sauvageau.....	Montreal.....	Feb. 14th.
Lemieux, Martial.....	St. Vincent de Paul	T. S. Brown.....	Montreal.....	Feb. 6th.
Lothrop, Galen, Jun.....	Westbury, C. E.....	A. M. Smith.....	Sherbrooke.....	Jan. 30th.
Lowell, Richard.....	Galt.....	Alex. McGregor..	Galt.....	Feb. 12th.
McIntee, Alex.....	Woodstock.....	Robert Bird.....	Woodstock.....	Feb. 14th.
McKague, Robert.....	Township of Carden	S. C. Wood.....	Lindsay, C. W.....	Feb. 14th.
McKinnon, Angus.....	Guelph.....	E. Newton.....	Guelph.....	Jan. 16th.
Manly, Joshua.....	Toronto.....	W. T. Mason.....	Toronto.....	Feb. 2nd.
Marceau, Louis.....	Longueuil, C. E.....	T. S. Brown.....	Montreal.....	Feb. 20th.
Marsh, Abraham.....	Pictou.....	N. McL. Bockus..	Pictou.....	Feb. 12th.
Mathien, Edouard.....	St. Barnabé.....	T. Sauvageau.....	Montreal.....	Feb. 7th.
Mills, Eliza Lyman.....	Montreal.....	T. S. Brown.....	Montreal.....	Feb. 6th.
Mitchell, William John.....	Cobourg.....	E. A. Macnachten..	Cobourg.....	Jan. 28th.
Moore, Robert.....	Shakespeare, C. W.....	Thos. Miller.....	Stratford.....	Feb. 19th.
Morton, Albert.....	Belleville.....	Geo. D. Dickson..	Belleville.....	Jan. 28th.
Mylne, John.....	London.....	L. Lawrason.....	London.....	Feb. 1st.
Nicol, Peter Murray.....	Township of Blanshard.	Thos. Miller.....	Stratford.....	Jan. 25th.
Oeler, John.....	Craigvale.....	S. Mancoers, jun.	Craigvale.....	Jan. 19th.
Pegg, Nathan.....	Simcoe.....	A. J. Donly.....	Simcoe.....	Feb. 12th.
Pillar, Lindsay.....	East Williamsburgh, C. W.	T. S. Brown.....	Montreal.....	Feb. 20th.
Pratt, Alexander.....	Cobourg.....	E. A. Macnachten..	Cobourg.....	Feb. 1st.
Priddy, Richard.....	Grenville, C. E.....	T. S. Brown.....	Montreal.....	Feb. 20th.
Provost, Sophronie.....	St. Hyacinthe.....	T. Sauvageau.....	Montreal.....	Feb. 9th.
Reid, Nathaniel.....	London.....	Thos. Churcher..	London.....	Feb. 5th.
Reuther & Son, Ignace.....	St. Hyacinthe.....	T. Sauvageau.....	Montreal.....	Feb. 2nd.
Revell, Samuel.....	Bothwell.....	Thos. Churcher..	London.....	Feb. 4th.
Riendeau, Alexis, individually and as partner of Riendeau & Co.....	St. Rémi.....	T. Sauvageau.....	Montreal.....	Jan. 24th.
Robitaille, Edouard.....	Quebec.....	A. Fraser.....	Quebec.....	Feb. 11th.
St. Julien, J. B. O.....	Papineauville, C. E.....	A. B. Stewart.....	Montreal.....	Jan. 19th.
Scantillon, Francis.....	Montreal.....	T. S. Brown.....	Montreal.....	Feb. 20th.
Simard, René Charles Et.....	Quebec.....	Wm. Walker.....	Quebec.....	Jan. 29th.
Stevens, S. & G.....	Trenholmsville, C. E.....	A. M. Smith.....	Sherbrooke.....	Feb. 8th.
Stewart, David H.....	Mitchell.....	Thos. Miller.....	Stratford.....	Feb. 4th.

ASSIGNMENTS.—(Continued.)

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTIFICATION TO FILE CLAIMS.
Stewart, Alex.....	Millbank, C. W.....	Thos. Miller.....	Stratford.....	Feb. 18th.
Stroud, Wm. Decker.....	Montreal.....	A. B. Stewart.....	Montreal.....	Jan. 31st.
Taylor, David H., individually and as partner of Brims & Taylor.....	Montreal.....	A. B. Stewart.....	Montreal.....	Jan. 20th.
Vanderlip, Justus.....	Township of Ancaster.....	W. F. Findlay.....	Hamilton.....	Jan. 26th.
Vary, Moses.....	Montreal.....	T. S. Brown.....	Montreal.....	Jan. 30th.
Vitch, William.....	Ingersoll.....	James McWhirter.....	Woodstock.....	Feb. 19th.
Warner, John.....	Woodstock.....	Jas. McWhirter.....	Woodstock.....	Feb. 6th.
Watt, James.....	Quebec.....	A. Fraser.....	Quebec.....	Jan. 16th.
Watt, Robert.....	Brantford.....	A. W. Smith.....	Brantford.....	Jan. 30th.
Williams, Israel.....	Township of Grimsby.....	J. J. Mason.....	Hamilton.....	Jan. 21st.

WRITS OF ATTACHMENT.

PLAINTIFFS.	DEFENDANTS.	SHERIFF'S OFFICE AT	DATE.
Alexander Buntin.....	John Sim Peter.....	Peterborough.....	Jan. 22nd.
Isaac Buchanan, Adam Hope and Chas. } James Hope.....	Palmer Way and Wm. Way.....	Sarnia.....	Jan. 12th.
William Burgess, jun.....	Wm. Burgess, sen.....	Walkerton.....	Jan. 23rd.
William Darling and Thomas Darling } Geo. Hunter, Patrick Thomas Duffy and } Bradstreet D. Johnston.....	Charles B. Major.....	Guelph.....	Jan. 10th.
	John Bow.....	Perth.....	Feb. 2nd.
Norris Conrad Peterson.....	{ Francis Woodard and } Edwin D. Broughton.....	Sarnia.....	Feb. 6th.
James Shields.....	Emery Blanchard Ried.....	Perth.....	Feb. 11th.

NOTE.—Among the notices is one by Mr. Barthé, official assignee at Sorel, calling the creditors of Joseph Beaupreant together, for the purpose of advising as to the best means of disposing of the effects found in a hidden place in the house formerly occupied by the insolvent.

WAX TAPERS AT FUNERAL CEREMONIES.—

Le juge Johnson vient de décider à Waterloo une cause d'une très grande importance.

Un homme fait enterrer à ses frais son frère mort dans la plus grande pauvreté : entre autres choses il fournit les cierges nécessaires au service funèbre, et il emporta les restes chez lui. Le curé les réclama, prétendant que de droit ils lui appartenaient.

Le défendeur dans ses défenses a prétendu : 1o. Que les cierges à demi brûlés lui appartenaient, puisqu'il les avait fournis. 2o. Que tout au plus pouvaient-ils appartenir à la Fabrique, et qu'ainsi le curé ne pouvait les réclamer pour lui-même.

Le demandeur a prouvé la coutume, qui est toute en sa faveur, et appuyé de l'autorité des auteurs, de Jousse en particulier, il a prétendu qu'en cette matière la coutume faisait loi. Le juge lui a donné raison. Le défendeur a été condamné à remettre les cierges ou à en payer la valeur.—*Courrier de St. Hyacinthe.*

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

Dec. 7, 1866.

O'HEIR, (plaintiff in the Court below), Appellant; and LEMOINE, (defendant in the Court below,) Respondent.

Action en bornage.

The plaintiff, claiming under a deed of concession from the Seigneur of Sorel, brought an action *en bornage* against the defendant, whose land abutted on that conceded to the plaintiff. It was held that the plaintiff had proved his possession, and a *bornage* was ordered.

This was an appeal from a judgment of the Superior Court for the District of Richelieu, rendered by *Laberge, A. J.*, on the 28th of June, 1864, dismissing the plaintiff's action. The action was *en bornage*, brought by the plaintiff as proprietor of a certain gore of land, which he alleged had been conceded to him by

the agent of the Seignior of Sorel, by deed passed 10th October, 1839. The defendant, whose land abuts on the gore so conceded to the plaintiff, invoked by his plea a possession of thirty years, and prayed that the deed of concession be declared fraudulent. The plaintiff answered specially, denying that there had been any fraud.

On the 30th June, 1863, the Court, having heard the parties, ordered, *avant faire droit*, that a surveyor be named to make a plan of the property in contest. The report of the surveyor was homologated, and on the 24th June, 1864, final judgment was rendered, dismissing the plaintiff's action on the following grounds: That although a concession had been made to the plaintiff's *auteur* of the land in question, yet neither he nor his *auteur* had ever taken such possession as was required by law. Further, that it appeared the defendant had had possession of the land, and therefore the plaintiff had no right to bring an action *en bornage*. From this judgment the plaintiff appealed, submitting that the deed of concession was a valid and sufficient title; that the thirty years' possession of the defendant was not proved; and that he, the plaintiff, had exercised his right of property by cutting wood upon the land, which was still in a wild state. It was also objected that the report of the surveyor went beyond the authority given in the interlocutory judgment, and should have been set aside.

MONDELET, J. We think that the plaintiff has sufficiently proved his possession, and that the judgment must be reversed.

The following is the substance of the judgment as recorded: Considering that the appellant has a right to demand a *bornage*, and that he has made proof of his possession, and that the Court below was in error when, by its interlocutory judgment, it ordered the appointment of a surveyor, *avant faire droit*, to prepare a plan or description of the property; and that there was error in the final judgment dismissing the plaintiff's action, the Court sets aside and annuls said judgments, and orders that a sworn surveyor be named by the parties within fifteen days, or otherwise to be named by the Court, to proceed to draw a dividing line between the respective properties; the

respondent to pay the costs of appeal, the costs of the Court below to be reserved.

AYLWIN, DRUMMOND, and BADGLEY, JJ. concurred in the judgment.

J. Armstrong, for the Appellant.

Lafrenaye & Bruneau, for the Respondents.

Dec. 4, 1866.

WOODMAN, Appellant; and GENIER, Respondent.

Defective Return—Record remitted.

The return of service having been found defective by the Court, the record was ordered to be remitted to the Court below, that the parties might be heard on the point raised by the Court.

Appeal from the District of Beauharnois.

AYLWIN, J. The party who is sued as proprietor in possession, and who is mentioned, not only in the declaration, but even in the writ, as one of the defendants, has not been served with a copy of the declaration and writ. We therefore order the record to be remitted to the Court below, in order that the parties may be heard on this point, as to whether the action should be dismissed, or this party be brought in.

BADGLEY, J. Here the doubt has been raised by the Court, and not by counsel. We think that in all cases where the doubt is first raised by the Court, the parties should be heard.

DRUMMOND, J. A form of signification has been prepared in blank, but has not been filled in or signed by the bailiff.

Record ordered to be remitted.

COURT OF REVIEW.

Dec. 22, 1866.

TAYLOR v. MULLIN.

Court of Review, Jurisdiction of.

Held, that the Superior Court, sitting as a Court of Review, has no power under the statute, to revise judgments in cases which are not susceptible of an appeal; that where there is no right of appeal there is no right of revision: and therefore that there is no right of revision with respect to a judgment under the Municipal Act of Lower Canada.

The defendants having inscribed this case for

revision, the petitioner, Taylor, moved that the inscription be rejected, on the ground that the judgment of which the revision was asked, having been rendered under the Municipal Act, was not subject to revision. The right of appeal was expressly taken away by Statute, and it followed that there was no right of revision.

SMITH, J. (dissenting). I am of opinion that the parties are entitled to a revision of the judgment. The question has already come upon several cases, one of which was *Ex parte Spelman*, and the Court refused to permit the case to be inscribed for review, upon the ground that where there is no appeal there is no review. This is a nice expression, but when you come to examine the question, the soundness of the doctrine seems doubtful. The Court of Review is not a Court of appeal. It is still the same Court, the Court of original jurisdiction. The Statute merely suspends the judgment of one judge, till it has been revised by three judges. It has been pointed out to me that I concurred in one of the judgments refusing the right of review. But I did so without looking into the matter, on being told that the statute did not allow it. On examination I find that I must dissent from the doctrine which has been held in several cases here, and also at Quebec.

BERTHELOT, J. The statute has expressly taken away the right of appeal in the present case, and I am clearly of opinion that where there is no appeal there is no revision.

MONK, J. I think the question is one of considerable difficulty. The pretension that there is no revision where there is no appeal seems to me to admit of considerable doubt. The Court of Revision is the same Court, and unless there is something which expressly takes away the right of revision, I think that all final judgments should be subject to revision by three judges. All I can say is this, seeing that the rule, that where there is no appeal there is no revision, has been held by the Court at Quebec, and seeing that we have held the same here in two or three cases, and, finally, that Mr. Justice Berthelot is as decidedly against the right of revision as the honorable and learned President of the Court is for it, I con-

cur in the rule already laid down, that where there is no appeal there is no revision.

Inscription rejected.

Abbott & Carter, for the petitioner.

Devlin, for the defendant.

SUPERIOR COURT.

Feb. 16, 26, 1867.

ROYAL INSURANCE CO. v.

KNAPP AND GRIFFIN.

Capias—Cause of action—Illegal detention of property—C. S. L. C. cap. 87, sec. 8.

Bonds and securities to a large amount were stolen from the plaintiffs by the defendants in the State of New York, without the limits of Canada, and were subsequently brought by them within the Province, and illegally detained there. The defendants being arrested under a *capias* :—

Held, that the cause of action, within the meaning of C. S. L. C. cap. 87, sec. 8, arose in New York, that it existed there wholly and entirely before the defendants reached Canada, and, therefore, that the defendants were not liable to be imprisoned under a *capias*.

This was a petition by the defendants, who had been arrested under a *capias ad respondendum*, to be discharged from custody. [*Vide ante*, p. 189, for the proceedings on the motion to quash, which was dismissed by *Berthelot, J.*]

Robertson, Q. C., for the defendant Griffin. No *capias* can be issued on a liability like this, though there may be a right of action.

In England, by 21 Geo. II., cap. 3, it was enacted that in all cases over £10, *capias* might issue on affidavit of a right of action. But in Canada there must be an "indebtedness;" the *capias* and action are distinct; the *capias* may be lost, while the action may remain. No judgment can be cited maintaining a *capias* on a cause of action not founded on indebtedness, or a debt sworn to. In *Beard v. Isaac*, in Review, decided 30th May last, a person in Liverpool hired a vessel and cargo, and refused to carry on his contract. A *capias* was issued, charging him with the difference between the rates of freight. *Badgley, J.*, held that in commercial cases, where there is a money loss, on a contract for money value, *capias* would lie. This went far, but not to the length of saying: "You took and converted my property, e. g. my horse, and are

indebted in its value; therefore, I have a right to *capias*." The illegal holding possession of bonds or any personal property in Canada, if a good ground of *capias*, must cover the principle of illegal possession and holding of real property too. Real property is as much favored as personal. The *capias* must be for a debt, and that must be clearly sworn to as a present indebtedness to plaintiff. A *capias* will not lie by saying: "You attempted to murder me (say in New York); you cut off my arm, therefore, I can *capias* you. Secondly, there can be no *capias* on a cause of action arising out of the Province. By the C. S. L. C. p. 810, it is enacted that "the Court or Judge may order any person to be discharged out of custody, if it is made to appear, on satisfactory proof, that the cause of action arose in a foreign country." In the affidavit and declaration there is but one phrase, one sentence, one cause of debt, one cause of action—illegally obtaining possession and illegally holding in Montreal.

Thirdly, the proof establishes the loss of the bonds at New York. They were missed after an interview of defendants with McDonald, plaintiff's agent. But this witness does not swear to the indebtedness of the defendants, or that they took the bonds. Admitting that the bonds were illegally obtained possession of, it must have been at New York. This is shown by plaintiffs' witnesses, and the cause of indebtedness as well as of action arises out of Lower Canada. The "illegal holding in the City of Montreal" is not proved. None of the other witnesses examined say the bonds have been seen in this Province. Mulvahille's statement of what took place in jail is:—I asked him (Griffin) "what have you done with the bonds?" and he answered, "We have got them all right here (Montreal) planted." This the sole evidence, and it is unsupported. Even if it were uncontradicted and the story credible, it would be insufficient. The debt has not been proved, and it should have been clearly proved by the affidavit itself. The plaintiff must clearly show that in this case the Court has jurisdiction. He alleges the sequestration of the defendants' effects in the affidavit, but states in it also, that they never had any effects, real or personal. Mr. Routh

swears that they are "secreting their estate and effects, with intent to defraud their creditors;" that they are citizens and subjects of the United States—merely here in the city of Montreal temporarily: have no domicile in Canada, nor do they own any property, real or personal, in this Province. But all this is very vague, and could not at all induce the Court to hold the defendants on *capias*. It was urged that holding in Montreal these bonds, was, as it were, a new cause of action, and, therefore, a *capias* would lie. But this holding must be traced back to its inception, and will and must continue to be qualified by the *first possession*, whether legal or illegal. If the defendants on the 10th Dec. illegally obtained possession of the bonds in question at New York, there was a commenced illegal holding *there*: the *délit* was complete and the holding commenced there. In other words, the illegal holding commenced at New York, and the coming with the bonds into Canada on the 12th did not change the place of the *délit*; there was the origin of the cause of action founded on the *délit*. So if a contract is made at New York, and the debtor comes to Lower Canada, his debt exists, but the cause of action remounts to the original contract. By using the words of the Consolidated Statutes, "no *capias* on a foreign cause of action," our statute includes both contracts and *délits* as causes of action, and excludes *capias* in both cases. It was held in Silverman's case, that where a note was given in Montreal for a debt which originated in the States, no *capias* lay. The note was held to remount to the place where the debt originated, although it was acknowledged here. Now, why should a liability founded on a *délit* committed at New York not be treated as having originated there, and as "a cause of action" perfected? How can it be pretended that an illegal *holding* of bonds or other personal property (which all admit was the consequence of an alleged illegal obtaining possession thereof at New York) can of itself be treated as a new and independent cause of action, merely by ignoring New York as the place of the *délit*, and alleging a holding in the city of Montreal? The attempt to restrict the whole cause to the holding in *Montreal*; the omission of the place where they were

illegally obtained, arise from the wish to get rid of the statute, which prohibits *capias* on every contract, *délit*, or other cause of action originating in a foreign country. In case of a foreign *délit* the foreign cause remains; in case of the *délit liability* remains; the action founded on the *délit* or liability remains, but there can be no *capias*.

Kerr, for the defendant Knapp. Defendants filed petitions for discharge from custody, and examined Mr. Routh as a witness, who admitted that he knew nothing personally of the facts relative to the obtaining possession of the bonds on 10th Dec. by defendants, or their holding them in Canada; that his knowledge thereof was derived from third parties; but he admitted that the alleged obtaining on 10th Dec. was an obtaining in New York; as to the other points in his affidavit, with respect to the defendants leaving Canada and secreting their estate, his information was derived from Captain Young, Chief of the Detective Police in New York, and Mr. McDonald, agent for the plaintiffs in that city. The plaintiffs issued a commission to New York, and thereunder examined Mr. McDonald, Capt. Young and others. By that evidence it may, for the sake of argument, be assumed that on the 10th Dec., at New York, a wrongful taking by the defendants of the bonds in question is established; and that afterwards they (the defendants) sought refuge in Canada. There is no proof that the defendants meditated leaving Canada, or had secreted their property, the evidence of McDonald and Young on those points being hearsay. A person of the name of Mulvahille has been examined, brought up under a writ of habeas corpus from the gaol; he deposes to admissions made by Griffin, as to the manner in which the taking of the bonds from the safe in the insurance office at New York was effected, making Griffin the person who walked about the office whilst Knapp engaged McDonald in conversation; whilst McDonald deposes that it was Griffin who kept him in conversation whilst Knapp walked about the office. Mulvahille moreover declares that Griffin told him the bonds were here. He also says that he told Payette, the gaoler, that he wished to see one of the plaintiff's agents, and that in consequence of such intimation,

Mr. Perry, the plaintiff's inspector, called upon him.

The first question for consideration is, whether the affidavit upon which the writ of *capias* was based, being shown to be the affidavit of a person not having a personal knowledge of defendants' indebtedness to plaintiff,—is not thereby destroyed; and such being the case, whether all the evidence adduced under the commission on that point is not illegal, and should be rejected from the record, and defendants discharged on the ground of want of proof of the existence of a debt by defendants to plaintiffs. Under the clause of the statute, the evidence of such indebtedness in the affidavit must be derived from the personal knowledge of the person making it. An affidavit to the effect "that defendant is personally indebted to plaintiff in a sum of \$80, as the deponent has been informed," is insufficient, and a *capias* issuing thereon would be quashed on motion. [1 Archbold's P., p. 655. Schröder on Bail, p. 42.] In this case, it is true, Mr. Routh swears positively in his affidavit, to the fact that defendants obtained illegally the bonds, that they now hold them illegally at Montreal, and have refused to deliver them up; but when examined as a witness, he admits that he never saw the bonds, and has no personal knowledge of the facts he has sworn to, save the making the demand to restore. His allegations are founded upon information derived from others, and the affidavit is of no avail, and consequently there is no proof of the existence of any debt. There is no evidence that the defendants were about to leave the Province, or that they had secreted their estate, &c., with intent to defraud. By the *Capias Act*, it is provided, that if a party arrested shows to a judge of the Superior Court on summary petition, that the cause of action for which he has been arrested arose in a foreign country, he shall obtain his discharge from custody. By the plaintiffs it is pretended that it is a matter of no importance in this case where the larceny or wrongful taking of the bonds occurred. That the wrongful detention and refusal to restore them when demanded, wherever the same occur, give rise to the cause of action in the place where such illegal detention is continued, although that place

may not be the same as that wherein the larceny or wrongful taking of the bonds occurred. That consequently, in this case the wrongful detention and refusal to restore having taken place in Canada the cause of action did not arise in a foreign country, although the original larceny or wrongful taking was effected in New York. Defendants pretend that the wrongful taking in New York is the cause of action in this case, and that it consequently arose in a foreign country. It becomes necessary, in the first instance, to establish the meaning of the words "cause of action." In cases of contract it is where the contract was made. (Warren v. Kay, 6 L. C. R. 492; Jackson v. Coxworthy, 12 L. C. R. 416; 1 Felix, p. 222; Senecal and Chenevert, 6 L. C. J., p. 46.) But I go even further, and accept "la juridiction speciale de l'obligation" of the Roman Commentators as the jurisdiction within which the cause of action on that obligation arose. Immediately upon the commission of a *délit*, or wrongful taking of bonds, arises not only the obligation to restore their value on the part of the thief, but also the right of action in favor of the proprietor to recover the bonds or their value. (Mackeldey Ms., § 482, 485, p. 233, n. (4) (13); 2 Savigny Oblig., p. 46, 449; 8 Savigny D. R., p. 281, 237.) He also cited from Westlake, Private Int. Law, No 108, 114, 247, and Maine's Ancient Law, to show that the forum *delicti* in every case is the forum of the country within which the *délit* was committed. That country was the *lieu* of the *acte obligatoire*, it was there that the obligation was born, and it was there, consequently, that the action arose, for the action is based upon the obligation, and the obligation therefore, is the cause of action. A consequence of the admission of this principle is, that when an action is instituted in the forum domicilii of the debtor, grounded upon the commission of a *délit* in another country, the law of the forum *delicti* controls the case, so that, amongst other things, what would be a justification in the country where the *délit* had been committed, would be a justification in the country where the action is tried. (Lord Mansfield, *Mostyn v. Fabrigas*, Cow. 175, 172. In contracts it is laid down that when any difficulty

arises with respect to the rate of exchange and interest due thereunder, we are to take into consideration the place where the money is, by the original contract, payable; for whosoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay in order to remit it to that country. In cases of *délit* the principle is the same, and thus the interest is measured by the rate of the *locus delicti*, and exchange in this case (if judgment were rendered against the defendants) should be so as exactly to replace in New York the bonds wrongfully taken there by the defendants. (Etruis v. East India Co. 1 P. W. 395, 2 Bro. P. C. 382; Westlake, No. 230, 237; Story on Con. of Laws, sec. 307 to 310.) We have, then, previous to the arrival of the defendants in Canada, certain rights acquired by the plaintiffs against them, and certain obligations by them incurred towards the plaintiffs, all springing from the commission by the defendants of a *délit* in New York. The plaintiff, immediately upon the *délit* being committed, had the right of instituting an action similar to the present one against the defendants, not only in the United States, but, according to the principles of international law, wherever the defendants might be found. The obligation incurred by the commission of the *délit* travelled with the defendants wherever they went, and the plaintiffs' right to sue them accompanied them in their travels. But the changes of domicile did not create new obligations towards the plaintiffs or new causes of action against the defendants; so that, in fact, the holding in Montreal and refusing to restore add nothing whatsoever either to the obligation of the defendants or the right of action of the plaintiffs. But by the plaintiffs it is pretended that the holding and refusal here give rise to the cause of action in Canada. But the wording of the plaintiffs' affidavit shows that the illegal obtaining on the 10th Dec. in New York, constitutes a portion of the cause of action, for the illegal holding and refusal to deliver, followed there as a matter of course. But if, on the contrary, the plaintiffs pretend that the original obligation incurred by defendants by the taking of the bonds is extinguished, where and when did such extinguishment occur? if no satisfactory answer be given the

only conclusion to be arrived at is that it is in full force. The argument insisted on by the plaintiffs, that because at common law the passage of thieves with their plunder through a district other than the one wherein the larceny was effected justifies the indictment of the thieves therein for larceny, upon the principle that every fresh removal is a fresh trespass, and that consequently the defendants' flight to Canada with the bonds was a fresh trespass, giving rise to a new cause of action here, cannot be admitted as sound. At common law the general rule is that an indictment can only be presented in the district wherein the crime was committed. The case of the thief removing with his plunder into another district, and being liable there to indictment is one of the exceptions to the rule; but it is founded upon a legal fiction of the common law which extends solely to the boundary of the State within one of the districts of which the larceny was committed, and there dies; for it is clear that no indictment can be presented in Canada for a larceny of bonds effected in the State of New York (2 Russell, p 331-332. 1 Archbold, P. & P., p. 69 and notes.) Under our law no *capias* can issue in any action the cause of which arose outside of the limits of the Province of Canada, nor can such action be commenced by writ of *capias*. Can it be pretended that if a party contracts debts in a foreign country, removes into Canada with his estate and effects, and there gives his creditor a promissory note for the debts so due, dated and payable in the Province, upon which note dishonored the payee takes out a *capias*, that the defendant is not entitled to his discharge from custody upon the ground that the cause of action arose within a foreign country? The case of *Silverman and Jones*, decided by Mr. Justice Badgley, is a case in point in favor of discharge. The principle recognized in that case is, that rights which have once accrued, and obligations which have once been incurred properly and well by the appropriate law, are treated as valid everywhere, and that where once an obligation exists, the acts of the party obliged, which if the original obligation had not been in existence would have created one exactly similar, are productive of no effect, but leave the original obligation to be the

cause of action between the parties; thus it is necessary, in order to discover the cause of action in this case, to fix the period and the place when and where the original obligation by which the defendants became liable to pay to plaintiff the value of the bonds stolen, as prayed for in the conclusions of plaintiffs' declaration, was incurred. The period and place when and where the defendants so became liable are easily discovered. No one can doubt that the obligation so to pay to the plaintiff the value of the bonds so stolen, was incurred on the 10th Dec. last at New York, and consequently the cause of action in this case arose in a foreign country, and the defendants are entitled to their discharge.

Bethune, Q. C., for the plaintiffs. From the argument as it has been presented on the other side, and more especially from the argument of the learned counsel who has last spoken, I think that some of the points may be taken as admitted. The learned gentlemen do not raise the question that because the depositions disclose a felony, the plaintiffs are therefore debarred of all civil remedy. Consequently, I need not enter into a discussion of that point, though I am prepared to show that whether the facts as established by the evidence disclose a felony or not, the plaintiffs were nevertheless presently entitled to exercise their civil remedy.

Both of the learned counsel have avoided drawing your Honor's attention to the whole of the affidavit of Mr. Routh. They contented themselves with referring to the first paragraph and would not go on to read what follows, though I asked both of them several times to do so. The paragraph immediately following, and which I wished them to read, shows the way in which this debt originated.

First of all, Mr. Routh swears, that on the 10th Dec. last, the defendants illegally obtained possession of the bonds, and that they have them here in Montreal. This is the portion of the affidavit the defendants' counsel read, but the part which follows, and which they abstained from reading, is in these words:—
"That deponent hath personally demanded
"from the defendants the restoration of the
"said bonds and certificates; but they, the
"defendants, have wholly refused to restore

"the same or any part thereof to the plaintiffs, and the defendants still retain and secrete the same from the plaintiffs, so that the plaintiffs are wholly unable to revoke or attach said bonds and certificates."

The cause of debt is simply this: You Knapp and Griffin, have here in the city of Montreal some \$256,000 worth of bonds and securities; they belong to me; you got them into your possession illegally; I say you got them illegally, because I want to negative the supposition that you came by them honestly. The gist of the matter is—and that is our charge,—you have them here in your possession, without lawful title, and retain them against my will, and I challenge you to produce any lawful title you may pretend to have to them. My remedy *in rem* is taken away from me, or rather rendered nugatory, by your action, and, therefore, I want simply the value of my property.

I will now take up a matter of form to which the learned counsel who last spoke alone referred. He said, this proceeding must fall to the ground because fundamentally, a debt must be positively sworn to, and, although Mr. Routh, in his original affidavit has sworn to the debt positively, yet, in his examination under the Petition, he has admitted his information in this respect was merely hearsay. The learned counsel then contended, that the evidence of Mr. McDonald and the other New York witnesses, which was intended to supply this apparent defect, was illegal under the circumstances, and that the mere fact of Mr. Routh not being possessed of positive information, of his own personal knowledge, as to the indebtedness, was fatal to the plaintiff's case. Now, Mr. Routh in his affidavit undertook to swear distinctly and positively that the defendants owed this debt. The affidavit, then, being sufficient in this respect, holds the defendants in custody securely under the writ. They then say they are entitled to be relieved from custody, because what Mr. Routh has sworn is false. On this point my learned friend is technically wrong, for even if Mr. Routh's evidence under the petition has failed to sustain the positive assertion of his affidavit, yet, the issue tendered by the petition being the truth or falsity of

the original affidavit, it was competent to the plaintiffs to corroborate Mr. Routh's testimony by other evidence. The only effect of Mr. Routh's admissions as to the hearsay character of his information would be to make out a *prima facie* case for the defendants, and compel the plaintiffs to do what has been done, namely to prove the precise truth of Mr. Routh's original statement. We are relieved from all anxiety on this point, however, for Mr. Routh's affidavit has not been broken down in the way my learned friend tries to make out. For, although Mr. Routh swears that his information was in the main derived from what Mr. McDonald and the New-York detectives told him, yet, in answer to a test question put by Mr. Kerr, whether or not his information was solely derived from other parties, he distinctly states no,—and adds, that although it was so, in the first instance, his conversation with the prisoners in gaol so confirmed him as to the truth of such information, that it enabled him to swear as positively as he had done.

Another point raised by one only of the learned counsel is this: he says there is no satisfactory evidence that these men were going to leave the Province. Well, I may answer, they have put in no evidence to prove the contrary. The plaintiffs charge them with being strangers and professional thieves—mere wanderers, having no fixed place of abode, and certainly none here in Montreal,—and that if they once got out of gaol they would immediately leave the Province. Under the issues as tendered by their petition, the defendants were bound to make out at least a *prima facie* case, that this charge was untrue. But they have wholly abstained from adducing any evidence whatever on the point. Then as to the proof that they were really going to leave, I need only refer to the evidence of the New York detective Young, who swears positively to the character of these men, and that he gave Mr. Routh the information which he firmly believed to be true, that the moment the prisoners got out they would never be seen here again. Besides that, we have the evidence of Paxton, who says that these men having been a couple of days in gaol, stated that they confidently expected to be released.

They were originally arrested on the verbal complaint of the New York detectives, and remanded by Mr. Brehant, the Police Magistrate, until two o'clock in the afternoon of a given day. Whilst in custody, they conversed freely with Paxton and their fellow prisoners in the same ward, and boasted that they knew all about the law, and that they could not be held under the Ashburton Treaty, as the offence was only larceny and not robbery. They got out, and then to their amazement they came back again. The other debtors are surprised to see them return, and then occurs the conversation as to what brought them back. In that conversation they say "Oh! this will be only for a short time. But we were afraid they were going to kidnap us, as somebody else had been kidnapped;"—evidently referring to the case of Lamirande. I only mention these points to show that these men were under the apprehension of being kidnapped, and fully intended, should they have been released, to leave Canada, and thus prevent the possibility of such an occurrence. This makes the case of the plaintiffs in this respect as complete as can be, and, in the absence of any kind of evidence on the other side, to refute it, makes out much more than a mere *prima facie* case on the side of the plaintiffs. In this way I get rid of the two points, which were raised by one only of the defendants' counsel, and which are not really those on which the defendants mainly rely. The true turning point of the present discussion I take to be, whether or not the cause of action arose in a foreign country, and the solution of that question must depend upon the fact whether or not, when Mr. Routh made his affidavit, the bonds and other securities were really here in Montreal. There is to my mind very satisfactory evidence that the defendants are the men who really took the bonds from New York, and that they had them here in Montreal. If I make out this, I make out my case. The pretension of the plaintiffs here, is simply this: you, Knapp & Griffin, have here certain bonds, my property, which you refuse to restore to me, and to which I say you never had any legal title. Supposing you stole them, what does that matter? If you bring them here into Ca-

nada, that is a new caption. If the theft is committed in one place, and the thief goes to another, he can be indicted there. This is undoubtedly the law, where the places are within the same sovereignty or government. But the principle of the mere caption is the same, whether the place be or be not under the same sovereignty. Mr. Carter has looked up the authorities on this point, and will cite them to the Court. My simple charge here is, you have got my property, and you have no title to it. I ask you to restore it, and you won't do so. The cause of action, then, is not the stealing of the bonds in New York, but the illegal detention of them here in Montreal. It matters not where the defendants originally got possession of the bonds, it is enough that they have them here; that they have no legal title to them; and that they refuse to restore them. Therefore, all the authorities of my learned friend, Mr. Kerr, as to a foreign debt, fall to the ground. The case is reduced to a mere question of evidence, as to whether or not the defendants really brought the bonds into Montreal. On that point I apprehend there can be no kind of difficulty. The facts as they are proved are these. It is in evidence and proved to a demonstration that on the 10th December last the Royal Insurance Company owned and possessed these bonds; that they were contained in a tin box which was deposited in the vault of the Company at New-York, and that the New York agent, Mr. Macdonald, had the key of the box in his pocket. Knapp and Griffin came into the office; one of them, it matters little which, engaged the manager in conversation about a life insurance, while the other walked backwards and forwards in the office. Finally these two men went out,—nobody else came in,—and after they went out the bonds were found to have disappeared. The presumption is certainly very strong that these were the men who took them. One of them immediately takes flight the same day to Canada, the other leaves the next day. In a day or two they are followed by their wives. They all take up their quarters at the Ottawa Hotel in Montreal, and a New York detective who is here looking after other bond thieves—for unfortunately bond robberies have been pretty

frequent of late—telegraphs to detective Young “Knapp and Griffin are here.” Mr. Macdonald, the Agent of the Royal Insurance Company in New York, soon after comes here, accompanied by the New York detectives, and he at once recognizes Knapp and Griffin as the two men who had been in the office immediately before the bonds disappeared. The presumption of law clearly is that in fleeing as they did they naturally carried off the booty which they had risked so much to secure. Following up the narrative of events we find that the New York detectives who came on with Mr. Macdonald, recognize these men and have them arrested. The Manager of the Royal Insurance Company here, Mr. Routh, and the New York Agent, are then advised to see the prisoners in gaol, and demand the restitution of the bonds, in the hope that they might be thus induced to make amends, and if not, that their positive refusal to give up the bonds should be established. Mr. Routh, Mr. Macdonald, and Mr. Perry, the Inspector, accordingly visit the gaol. The conversation with the prisoners is sworn to by Mr. Routh and Mr. Macdonald. Paxton, a prisoner who happened to be confined in the same ward, tells us, that the defendants in speaking of their arrest at that time said it was a mere matter of detention; that they expected in a few days to be released. That they knew there was no criminal charge that could get at them, and that the bonds were “planted,” and could not be got at. Well Mr. Routh accosts these men, and says, “We have come about these bonds; you had better give them up and get out of this place.” They commence by denying that they ever had the bonds at all. Macdonald says one of them got angry, and told Mr. Routh he had no business to come there. Then Knapp remonstrated with the other, and said, “There is no use in getting angry; these gentlemen have come here on business.” Treating the affair, then, as a mere matter of business, Knapp says, “What do you value these bonds at?” and thereupon he and Mr. Macdonald go into a minute calculation, establishing some of them to be worth so much and others so much, and he then asks, “What reward are you offering for them?” “Well,” says Mr. Routh

“\$10,000 has been offered in New-York,” intimating that the Company would be very happy to give that sum. Whereupon Knapp exclaims, “Well, gentlemen, you must take us to be God damn fools to give up such a sum for such an amount.” Then comes in the additional evidence. We have first the evidence of Mr. Mulvahille, who was confined in the same ward with the defendants, and swears positively as to the conversation between him and Griffin. Griffin said it was better to be there for two months than “up the river for five years.” All this time these men were under the impression that their arrest was a mere temporary affair. Mulvahille says that Griffin explained how the whole affair was done, how one of them engaged the “old bloke” (as he called the manager) in conversation about a life insurance, while the other secured the tin box, concealed it under his coat tails, and then walked out of the office. And, in reply to a question from Mulvahille as to where the bonds were, Griffin replied that they were all safe here and were “planted.” From Paxton we have somewhat of a similar deposition.

Carter, Q. C., also for the plaintiffs. The first inquiry is as to the nature of the plaintiffs' claim in this case. The Royal Insurance Company is an English institution, having an office in Montreal and a branch in New York. The evidence discloses the fact that the larceny of the bonds constituting the subject matter of the claim was committed in New York, by the two defendants, who immediately sought safety in flight, and, availing themselves of the facilities afforded by our accessible frontier, they took refuge here. The first question to which the Court must direct its attention is one of fact, viz., does the evidence establish that a larceny of the bonds was committed, and whether the defendants were guilty of it? It is contended by the learned counsel, Mr. Robertson, that the evidence fails to establish the fact that the defendants were the guilty parties. I cannot understand how he could assert such a proposition, unless he wishes to ignore all the legal maxims to be found in every work on evidence. If I understand his proposition, it is this—that in a civil case nothing short of direct and positive testimony will suffice. I

shall show by positive authority, that he is in error, and that the distinction, if any, between civil and criminal cases, is to favor the admission of presumptive evidence, as supplying the want of direct proof in civil cases, whereas in criminal cases such evidence, although admitted, is always received with greater caution.

[Mr. Carter cited Best "Principles of Legal Evidence" p. 539; also, the cases of *Armory vs. Delanoir*, 1 Strange, 505, and *Mortimer vs. Cradock*, 7 Jur 45.]

Then as to the fact, the evidence consists of not only strong presumptive proof, but positive, as derived from the admissions of the defendants, sworn to by two witnesses. It was proved that both defendants entered the Company's office at New York under pretence of effecting an insurance, and that one of them engaged the attention of the manager in such a manner as to divert his attention from the other. Within fifteen minutes after they had left, the box containing the bonds was missed from the safe. No other person entered the office between the time they left and when the loss was discovered. The defendants left New York the same day, and within a few days after, they are found in Montreal with their wives, changing large sums of money; whereas it is proved that, when in New York, they were in needy circumstances. In support of the position Mr. Carter assumed, he cited the following authority to establish that, the loss having been proved, the sudden flight and the change of circumstances of the defendants, coupled with their presence at the Company's office very shortly before the bonds were missed, constituted complete evidence of their guilt: Best "Pr. Legal Ev.," pp. 564, 568 and 569. Then there was additional evidence afforded by the defendants' avowal of the commission of the crime, and the description given of the way it was accomplished, agreeing precisely with the testimony of the manager as to what took place, to his knowledge, when the defendants were in the Company's office.

The next point to be considered is that urged by Mr. Kerr, who pretends that the affidavit of Mr. Routh has been destroyed by his subsequent examination as a witness. The

very reverse is the case. Mr. Routh's examination fully corroborates what is contained in the affidavit he made. The authority cited from Archbold by Mr. Kerr does not apply. It is not pretended that the affidavit is defective, but it is said that Mr. Routh has admitted that his knowledge of the Company possessing the bonds was derived from the New York manager, and was, therefore, hearsay. In point of fact, Mr. Routh, while admitting this, has also said that he was confirmed in his belief of what the manager told him, by what the prisoners said to him, Mr. Routh, when he demanded the bonds from them. Assuming even that Mr. Routh had not seen the defendants before their arrest, if the affidavit was otherwise perfect, the question is not what means of knowledge had the deponent, upon whose affidavit the *capias* issued, but whether the material allegations were true. Take, for instance, the case of a merchant who makes the affidavit of a debt being due to him; if he was examined as Mr. Routh was, he would have to admit that he had no personal knowledge of the sale and delivery which was made by his clerks. But would Mr. Kerr pretend that in that case the *capias* would fail? Certainly not; the statute requires that the defendant should establish that there was no existing debt, as the sole question is one of fact, does the defendant owe or not?

MONK, J. You need not dwell any longer on that point.

The only question which remains for me to discuss, and in fact the only point worthy of consideration, is whether the cause of action arose in a foreign country. The whole of Mr. Kerr's argument is chiefly directed to this point, and his pretension is, that in cases of *distress* under our civil law, the right to a civil remedy accrues the moment the injury has been committed, and consequently that the cause of action arises where it has originated. In support of this pretension he has cited several authorities, many of them having no application, and others establishing a principle which favours the right contended for by the plaintiffs, that their remedy by civil action exists. It was contended by Mr. Robertson that the civil remedy could not be exercised. Upon this important point, the defendants'

counsel could not agree. There can be no doubt that Mr. Robertson is in error, and I will presently establish that Mr. Kerr commits the mistake of carrying his proposition to an extent which his authorities do not justify.

MONK J., addressing Mr. Robertson—Do you deny the right of the plaintiffs to exercise their civil remedy?

Mr. Robertson. I do.

Mr. Kerr. I do not; I admit that the civil remedy exists.

Mr. Carter. We may, then, take it for granted Mr. Robertson remains alone in his opinion. It is a question that can admit of no doubt. It is a remedy recognized in Criminal Courts, as well as at other tribunals, as your Honor must be aware, that even in criminal cases power is given to a Judge, after conviction, to order restitution. Then as to the other point, it is urged that the cause of action depends upon the place where the wrong was first committed. This I deny, as the real cause of action in this case is the fact that the defendants are here in Canada in possession of plaintiffs' property, and withhold it, refusing to restore it. It is a principle of the common law that the owner may follow his property, and every new jurisdiction into which the thief carries it is a fresh caption. This doctrine is applied even to criminal cases, so that the offence is regarded as repeated—as a new taking (*cepi*), and a new cause of prosecution established, altogether independent of the original taking. Mr. Carter cited, in support of this proposition, 1 Hawk. ch. 49, sec. 52, *Rex vs. Parkin*, 1 Moody C. C., and authorities cited in the note. In this case the plaintiffs complain that the defendants hold their bonds, and are converting them to their own use. It is the conversion which is the gist of the action. In support of the latter proposition, Mr. Carter cited 2 Selwyn, Nisi Prius, p. 1389.

As regards the remedy, we are to be governed by our law, which recognizes the right of arrest in civil cases. This is the general rule. There are exceptions, and it is for the defendants to show that they come within the operation of one of them. This brings us to the consideration of what cases the statute was intended to except from its operation. The

only reasonable interpretation of the statute is to hold that foreign debts mean such liabilities resulting from contracts where the implied assent of both parties may be invoked, as controlling their engagements, and the consequences resulting from them. But no such construction could be put upon our statute as that contended for by defendants' counsel to cover the case in question, so as to afford immunity to thieves stealing in New York and seeking safety with their booty by sudden flight into Canada, and then withholding the property from the real owner, and refusing to restore it. The true doctrine is, that the withholding and conversion of the bonds was a continuance of the injury, giving rise each day to a fresh cause of action. There was here a marked distinction to be made between those *délits* which, being of a personal nature, received their consummation and completion where the injury was inflicted, and the larceny of property, to which the common law applied another rule which is recognized by all systems of jurisprudence, viz: the right of the owner to claim his property or its value wherever he finds it.

Mr. Kerr, in reply. 2 Selwyn, 1389, cited by Mr. Carter, although it cannot be regarded as bearing upon the present case, has been referred to as proving the position taken that in cases of trover, the original finding is matter of inducement, the conversion being the gist of the case. From that authority Mr. Carter argues that the conversion only took place at Montreal, where the demand to restore was made and refused. Can it be pretended that, in opposition to the citations from Savigny and the other commentators upon the civil law, which all prove conclusively that the *délit*, in this case the wrongful taking or larceny of the bonds, is the source of the obligation of the defendants, this citation from Selwyn, writing on the common law upon trover, is to prevail, and the original taking is to be looked upon as mere matter of inducement?

But taking it for granted that my learned friend is serious in referring to Selwyn, I am prepared to show that the quotation he has given has really no reference to this case, no bearing upon its merits. My learned friend says, in this case the conversion took place in

Montreal, the secreting, the demand to restore, and the refusal, all prove the conversion here, and consequently as the conversion is the gist of the action, the cause of action arose here. I, on the other hand, pretend that when there is a wrongful taking, followed by a carrying away of the goods of another who has the right of immediate possession, that is of itself a conversion. 1 Chitty on Pleading, 153. Thus in cases of larceny where the property is removed by the thief, there is an immediate conversion of it. Conversion does not necessarily import an acquisition of property in the party converting. In this case, taking it for granted that the bonds were stolen in New York, the conversion by the defendants took place there on their removing the bonds from the office of the plaintiffs. A demand to restore and refusal are only necessary to establish the conversion in cases where the defendant became, in the first instance, lawfully possessed of the goods, and the plaintiff cannot prove some distinct conversion. Chitty, pp. 156, 157—P. No. 1 (2). For instance in cases of loan or bailment, a demand to restore and refusal are necessary if the lender or bailor cannot show a distinct conversion; but if such distinct conversion is shown there is no necessity for the demand and refusal. In England, then, under the authority cited, the conversion would be held to have taken place at New York. Moreover, why, if the larceny at New York is mere matter of inducement, did the learned counsel insist upon their having so clearly proved that the defendants were the parties who there effected that larceny? Why, if that larceny is a mere matter of inducement, producing no effect upon the case, were they forced to admit that without the evidence of that larceny in New York, given under the commission, the defendants would have been entitled to their discharge, Mr. Routh's affidavit having been destroyed? By the destruction of the affidavit as proof of the defendants' indebtedness, the *capias* is left without any basis to support it. The plaintiffs have no right with their evidence in reply to satisfy the Court of that which should have been proved by the affidavit. My conclusions are, 1, that Mr. Routh's affidavit on the subject of the defendants' indebtedness has been

destroyed, and that it cannot be bolstered up by evidence in reply. 2. That the larceny or wrongful taking in New York on the 10th December last is the cause of action in this case; that it arose in a foreign country; and that, consequently, the defendants are entitled to their discharge.

February 26.

MONK, J. This case has been brought up on two petitions to liberate the defendants from imprisonment, under a *capias ad respondendum*, issued at the instance of the plaintiffs on the affidavit to hold to bail, made by Mr. Routh, and which sets forth in substance:

(Here his honor read the affidavit, which will be found ante, p. 189.)

This affidavit was made on the 20th Dec. On the 26th of the same month the defendants appeared separately, and severally moved to quash because the affidavit did not disclose any legal and sufficient grounds of debt against the defendants, and that the cause of action did not arise within this Province.

Judge Berthelot dismissed both the motions, holding that the defendants were rendered liable by the fact of their being found here with the property in their possession; the owner of stolen property had a right of action against the thief wherever he found him with the stolen property in his possession. In this case it was not material whether the property was stolen here or in New York.

In this decision of the learned Judge, I entirely concur, both as to the sufficiency of the affidavit *per se*, and as to the right of action against the thief wherever he may be found; nor did I understand the defendants' counsel, in the present instance, to contest very strenuously the right of action merely. I understood them to concede the point, and in any case, I entertain no doubt about the law in that respect. The question here, however, is not as to the right of action, but as to the right of arrest and detention under a writ of *capias ad respondendum*, in the face of the facts proved on these petitions. Keeping this distinction clearly in view, I proceed now to inquire into the merits of the defendants' applications.

Chapter 87 of our Consolidated Statutes provides that "The Court, or any Judge of

"the Court, whence any process has issued "to arrest any person, may, either in Term "or Vacation, order such person to be discharged out of custody, if it is made to appear "on summary petition and satisfactory proof," among other reasons, "that the cause of "action arose in a foreign country." Under this provision of the Statute, the defendants presented each a petition to be discharged from custody, alleging that the cause of action for which the arrest was made, arose in the United States of America and not in Canada; that no such debt as that stated in the affidavit existed; that the defendants were not about immediately to leave the Province of Canada, or to secrete their estate with intent to defraud their creditors; and finally that the averments of the affidavit were untrue.

Upon these petitions, the plaintiffs and defendants proceeded to proof, and it has been, I think, conclusively established, as stated in the affidavit, that on the 10th of December last, the plaintiffs, who had a branch in New York, were possessed at their office in that city, of the bonds enumerated in the affidavit by Mr. Routh; that on that day they lost possession of this property, and that it is still illegally withheld from them.

The first question of fact to be determined is whether the defendants, as is alleged by the plaintiffs, were the parties who fraudulently took the bonds from the plaintiffs' office in New-York. I think it clearly results from the evidence adduced, that on the 10th December the defendants called upon Mr. McDonald, the plaintiffs' agent in New-York, and spoke to him about effecting an insurance upon their lives. The conversation took place in an inner room of the plaintiffs' office, and lasted about twenty minutes, being almost exclusively carried on between Griffin, one of the defendants, and Mr. McDonald. During all this time Knapp was walking to and fro, occasionally passing into an adjoining room, where there was a safe or vault, the outer door of which was open, and the inner one closed. In the inner compartment of this safe or vault, was a tin box containing the bonds. The defendants finally left, saying they would call again, and in about twenty minutes after

their departure, the agent, McDonald, perceived that the bonds were missing; the box containing them having disappeared.

This occurred early on the 10th, and on the 12th of December, in the forenoon, the defendants arrived in the Ottawa Hotel, in Montreal, and on the 15th of the same month their wives joined them here. The defendants are proved to have been before this time poor men and professional thieves. On the 20th December they were arrested on the *capias* issued in this cause, and immediately previous to their arrest, and while in jail charged with this robbery, they had the following conversation with Mr. Routh, who visited them with Mr. McDonald, to demand the restoration of the bonds. Mr. Routh says:

"I went down to the jail previous to the "making of my affidavit. When I saw them "I told them I had come down about the "bonds; that my advice to them was to give "them up, and get out of that place, the jail; "I think it was Knapp first spoke to me.

"They both denied having stolen the "bonds or having them in their possession. "Afterwards, when the conversation became "more free, Knapp said:—" "We are prisoners, and this is not a place to do business in. "We shall soon be released, and may then "call upon you, and deal or do business with "you."

"He (Knapp) then addressed Mr. McDonald and had considerable conversation "with him respecting the value of the bonds, "upon which he, Knapp, put his own valuation, and then asked me what reward was "offered for the restitution of the bonds. I "replied, ten thousand dollars. He then said, "Gentlemen, you must take us for pretty good "damn fools to give up such an amount for "such a sum."

"The other defendant, Griffin, first was angry, but afterwards cooled down, and spoke "much to the same effect that Knapp did."

Question by Counsel:—"Did the said "Griffin state he had any bonds in his possession, or had taken any?"

Answer:—"He did not distinctly say so."

This testimony requires no corroboration, and if it did, that corroboration is furnished by the evidence of McDonald, the New-York

agent. Two men, respectively of the name of Mulvahille and Paxton, were examined by the plaintiffs, and they state that they had a conversation with the defendants in jail. They say the defendants admitted they were the robbers of the bonds, and described, moreover, how the robbery was committed, and that they had the bonds *safely planted here in Canada.*

To this testimony I attach but little importance; it is extremely improbable, and the statements therein made contradict, in some particulars, the evidence of Macdonald, and so far it is unworthy of credit—it may be true or not. In any case, for the purposes of this decision, even admitting it to be true, I do not regard it as material. The remarks, however, of the defendants to Mr. Routh, taken in connection with certain other portions of the evidence adduced, leave no doubt in my mind of the robbery, or by whom it was perpetrated. As I view the testimony, therefore, I find it proved that the defendants abstracted the bonds in question from the plaintiffs' safe in New-York on the 10th December, under the circumstances stated by Mr. Macdonald. On that day they became illegally possessed of this property against the will of plaintiffs, and the probability is they have the bonds still in their possession, or under their control. It is also proved that they refused to restore them to the plaintiffs, or to disclose where they are, so that the plaintiffs might revendicate them, and upon these grounds mainly, if not exclusively, and under these circumstances, the plaintiffs had recourse to the remedy by "*Capias ad respondendum.*"

Now, as to the right of action in this case against the defendants, as before stated, there can be no doubt, and it was also conceded by all the Counsel, except one, Mr. Robertson, for the defendants, that had this robbery been perpetrated in Canada, the remedy by *Capias* would be a proceeding sanctioned by the law. Upon this point I have no opinion to give, and I studiously abstain from pronouncing any judgment in regard to this view of the law. But there is something more in this case, and that which gives rise to the whole, or at least the chief difficulty. I have to decide whether the robbery, the conversation, and

first detention of the bonds, having occurred without the limits of Canada, and within the dominions of a foreign State, the defendants are, under our law, upon their refusal to restore the bonds, and their continued and fraudulent detention of them here, liable to imprisonment under *Capias*.

That is the real question to be determined in this case. The clause of the Statute invoked by the defendants, in relation to this point, is to the following effect: It has been quoted in part above, but is reproduced here in order that we may not lose sight of the law we are called upon to interpret and apply. "The Court, or any Judge of the Court, whence any process has issued to arrest any person, may either in Term or in Vacation, order such person to be discharged out of custody, if it is made to appear on summary petition and satisfactory proof, either that the defendant is a priest or a minister of any religious denomination, or is of the age of seventy years or upwards, or is a female, or that the cause of action arose in a foreign country, or does not amount to forty dollars of lawful money of this Province, or that there was not sufficient reason for the belief that the defendant was immediately about to leave the Province with fraudulent intent, where that is the cause assigned for the arrest, or that the defendant had not secreted, and was not about to secrete, his property with such intent, where that is the cause assigned for such arrest."

This Statute, though enacting general rules and provisions, applicable to arrest under civil process, it will be seen also clearly enumerates the exceptions, among which is found the case of the *cause of action arising in a foreign country*; and I have simply to determine what, in the present instance, is the cause of action, according to the technical meaning of the words, and where that cause of action arose. The clause of the Statute above cited settles the rest. Now, according to the plaintiffs' own showing, they lost possession of their property by theft or robbery, on the 10th December last, in the City of New-York. I think they have also established that the defendants are the robbers—that they fled immediately to Canada,—that they detained the bonds,

—refuse to restore them or disclose where they are. Upon the facts thus established in evidence a civil remedy arises. The plaintiffs seek to recover the value of their property by an appeal to our civil tribunals, and commence their proceedings by arresting the defendants under a "*capias ad respondendum*," and I am to determine what is the cause of action in this case. Is it the illegal taking alone? Is it the conversion or fraudulent detention of the bonds, or is it the refusal to return them or to disclose where they are? Are there so many separate causes of action, or do they, all combined, only constitute one, the same, and the real cause? It seems to me these questions can be answered without much difficulty or hesitation, and I am of opinion that the real cause of action is manifest by the illegal taking, coupled with the conversion or fraudulent detention of the bonds. Their refusal to restore them in Canada is no more, in point of law, than the refusal to pay a debt, contracted in New York. I, of course, view this question as one of law merely, and irrespective of the moral considerations which the facts of the case suggest. All that occurred in Canada, so far as we know, or can suspect, is the *continued* detention of the bonds, and the refusal to restore them. This is not the cause of action in this instance. I may reasonably presume, from the fact that they refuse to disclose where the bonds are, that they have them in their possession, or under their control in Canada,—in other words, that they still fraudulently detain them from the plaintiffs. There can be no doubt but that this fraudulent detention constitutes an important element in the cause of action in this instance, as the refusal to pay a debt forms an essential ingredient in the cause of action arising out of a civil obligation or contract. But even so, did this fraudulent detention of the bonds take its origin in Canada or in New-York? Plainly in the latter place. It commenced there,—was simultaneous with the illegal taking, and it was complete immediately upon the perpetration of the robbery. Thus, the illegal taking—the robbery, if you will, occurred in a foreign State,—the fraudulent detention therefore began, originated there. It may be remarked, moreover, that in regard to the con-

tinued detention of the bonds, I am left to deal with presumptions. There is no evidence whatever of a conversion of the bonds in Canada, or elsewhere as a matter of fact, though in contemplation of law it may be said that the conversion took place immediately upon the illegal taking. There is no positive proof that these bonds ever were in Canada. I presume they were, and I presume, moreover, that they are still in the possession, or under the control of the defendants. But on the other hand, I have what I may regard as conclusive evidence, as before stated, that the robbery was perpetrated, and the illegal detention commenced in New York,—in other words, that the entire cause of action arose, originated there, and not in Canada. To hold the contrary, in my judgment, would involve us in difficulties not easily overcome, and in propositions not very intelligible as propositions of law. It was strenuously contended by the plaintiffs' counsel that the fraudulent and continued detention of the bonds, coupled with the refusal to restore them, was a new cause of action, arising wherever the defendants went, even if they passed from the dominions of one sovereign state to another. That the mere fact of the defendants being in Canada with their property, under the circumstances disclosed, gave them, the plaintiffs, a right of remedy by *capias*. That although the robbery was perpetrated in New-York, the defendants immediately fled to Canada to consummate the villainy there; and there, where the plaintiffs first found them, and where they first became fully aware of their being the thieves, they have a right to the most rigorous remedy the law has placed at the disposal of a creditor. That robbers are an exceptional class of men, and must be dealt with accordingly in an exceptional manner; that the causes of civil actions arising out of crimes or *délits*, should not be dealt with in the same manner as those resulting from civil contracts; that the "*lex fori*" and not the "*lex loci contractus*," or in this case not the "*lex loci delicti*" governs the remedy; and that by the law of Canada, in a case like the present, arrest on civil process would be one of the means which our Court would sanction in enforcing such remedy. It was also urged that in view of the facts proved, these

defendants should not be allowed to evade the operation of our law upon the grounds set forth by their Counsel, that, in fact, the cause of action to all reasonable intent, and for the purposes of this case, arose in Canada. No doubt there is much force in all this, but as I view the facts before me, these arguments and these generalities are not decisive. What is proved, or may be presumed to have taken place in Canada, with regard to this matter, constitutes no new element in the cause of action. The defendants were liable upon civil process in New-York, if liable at all, to the same extent, and in perhaps the same way, they are liable here. Their coming to Canada makes no change in their original liability, or in the cause of action. I am not aware of any precedents, nor have we much law, except some elementary *dicta*, to guide us in this matter. But having bestowed upon the case very careful attention, I am forced to the conclusion that the whole cause of action in the present instance, before stated, arose in N. Y., that it existed there wholly and entirely before the defendants reached Canada—and that no addition to that cause, nor any modification of it has taken place since their arrival here. Taking this view of the matter reluctantly, but without much hesitation, I feel bound to grant the prayer of the petition, and to liberate the defendants. No doubt it is a hard case. Our statute may be defective, but I think not. In any case, I must take it as I find it. I am only the organ of the law, and as such I am bound to interpret it according to my understanding of it, and to apply its provisions with a strict and scrupulous adherence to its letter, where its language is peremptory and unambiguous. In a case like the present, had it been possible for me to entertain a serious doubt,—could I have found in the words of the statute any uncertainty, or that kind of elasticity, if I may so express it, which would have enabled me, in the conscientious discharge of my duty, to refuse the defendants' application, I should have done so. But as it is, the law, and the facts of the case, however atrocious the latter may be, compel me to decide in their favor.

In conclusion, I would remark that our Legislature having employed a language so

intelligible and so decisive, I must assume that the law means precisely what is there so clearly enacted,—no more and no less. And I am of opinion that the letter and the spirit of the law are here in perfect harmony, and that this exemption from arrest on civil process to be found in the statute has not been made without good reason. Were it lawful to arrest foreigners here by *capias*, and to detain them in confinement upon civil liability, arising out of crimes or *délits* alleged to have been perpetrated in foreign States, such a mode of proceeding might lead to incalculable abuse and hardship in individual cases, and might, moreover, be fraught with perilous consequences. I am aware that this is not a case of international law. Neither treaties, nor the mutual comity between nations, come under my consideration. I have nothing to do with either, nor have I to analyze or discuss *ab conveniente*, or *ab inconvenienti* arguments in this matter; my duty is simply to decide a question of municipal law. But in doing so I may state that it is easy to conceive instances where parties might be subjected to long detention upon civil process in Canada, and be afterwards acquitted of the criminal charge in the country where the crime was alleged to have been committed. Besides, it would not be difficult to suppose a variety of cases in which false or doubtful accusations might result in flagrant injustice and mischief, unless special provisions existed to avert such consequences.

In my opinion our Legislature has wisely guarded against the possibility of such occurrences, and although, in this case, it is much to be regretted that my decision should come to the relief of vagabonds and professional thieves, under the circumstances proved, yet, on the other hand, I must look to the statute and to the facts established, and not to the character of the defendants.

It would be in the highest degree dangerous for any Court or Judge, without the express, the clearest sanction of the law, to establish a precedent such as that contended for by the plaintiffs. The petitions are, therefore, granted.

S. Bethune, Q.C. and E. Carter, Q.C., for the plaintiffs.

A. & W. Robertson, and W. H. Kerr, for the defendants.

[NOTE.—The case was immediately inscribed for Review, the defendants in the meantime being detained in custody.]

CIRCUIT COURT.

Brome Co., Jan. 26.

EASTMAN v. ROLAND ALIAS ROLINS.

Parol testimony was received to prove a verbal agreement extending terms of a written contract filed in the cause, affecting a sum above \$50.

Costs were allowed defendant in an action upon a promissory note, upon proof that plaintiff agreed, after the institution of the action, to withdraw the same on payment of debt alone, although the debt was not paid at the rendering of judgment; and under the circumstances, plaintiff's attorney was not allowed *distriction de frais*.

This was an action upon a promissory note for \$58. Defendant pleaded, 1st, an agreement by plaintiff to extend time of payment three or six months or longer, previous to the institution of the action; also, a promise on the part of plaintiff to withdraw action and pay his costs; concluding by tender of debt without depositing the same in Court.

Two witnesses were examined to prove plea, under objection of plaintiff's counsel. By one of the witnesses it was proved that plaintiff had agreed between the service of writ and return to withdraw the suit and pay the costs, provided defendant would pay the debt. The debt was not paid, and the action was thereupon returned into Court.

JOHNSON, J., in rendering judgment, said that plaintiff, having agreed to extend the time of payment, must be held to his agreement. Judgment for debt only.

Before the Court rose, upon application of defendant's counsel, costs were awarded against the plaintiff.

J. B. Lay, for the plaintiff.

E. Racicot, for the defendant.

(Reporter's Note.—Plaintiff's attorney by his declaration demanded *distriction de frais*. He submitted this point to the Court, and insisted upon his right for *distriction*, it being personal and vested in him. The Court held the contrary. *Vide Stigmy v. Stigmy*, 2 Rev. de Leg. 120; *Converse and Clark*, 12 L. C. R. 402.—J. B. Lay.)

RECENT ENGLISH DECISIONS.

QUEEN'S BENCH.

Marine Insurance—General Average.—A ship was submerged in deep water with heavy cargo on board; there was a common peril of destruction imminent over ship and cargo as they lay submerged; the most convenient mode of saving ship or cargo, or both, was by raising the ship together with the cargo; the cost of the raising would be an extraordinary expense for the common benefit of both, and the cargo would be liable to general average contribution, and the shipowner would have a lien on the cargo to secure payment of that general average. The ship being insured:—*Held*, that in determining whether or not the ship was a constructive total loss, the amount of general average which would be contributed by the cargo must be taken into account, and the cost of raising the ship calculated as reduced by that amount. *Kemp v. Halliday*, Law Rep. 1 Q. B. 520.

Action for Reward—Information leading to apprehension of Offender.—The defendant's shop having been broken into, and watches and jewellery stolen, the defendant advertised, "A reward of £250 will be given to any person who will give such information as shall lead to the apprehension and conviction of the thief or thieves." In about a week, R. having brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day with another of the stolen watches upon him. After two or three days, R., being in custody, told the police that some of the thieves would be found at a certain shop, and there they were apprehended a week afterwards, and subsequently convicted. In an action by the plaintiff for the reward, the jury having returned a verdict for the plaintiff:—*Held*, that the information given by the plaintiff was not so remote as that it could not be said to have "led" to the apprehension of the thieves; and that the judge had properly left the evidence to the jury, pointing out the remoteness of the information. *Turner v. Walker*, Law Rep. 1 Q. B. 641.

[This judgment has since been affirmed by the Exchequer Chamber.]

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THE RAMSAY CONTEMPT CASE.

We devote a considerable portion of our space this month to the proceedings before the Court of Queen's Bench in the case of Mr. RAMSAY. Unless the Judicial Committee of the Privy Council see fit to entertain an appeal, the judgment of our highest Colonial Court is, of course, final and conclusive, and we think it must be conceded that the weight of authority is entirely on the side of the majority. We admit, however, the cogency of Mr. Justice MONDELET's argument. There is something startling in the assertion of our Supreme Court that in certain exceptional cases, called contempts of Court, the same individual may be the accuser, the witness, and the judge, and his judgment final and irreversible. As stating this side of the question, we give here Mr. RAMSAY's letter to the Editor of the *Montreal Gazette*, under date March 11th.

"SIR,—You have very properly said that the judgments in my case give cause for alarm to the whole community, and the judgment of Saturday does not tend to allay the apprehension. It will be observed that the question decided is not whether this or that thing is a contempt; but the judges have laid claim to two privileges which are totally incompatible with the liberty of the subject:

1st. That any judge may construe an act either in Court or out of Court, into a constructive contempt of Court.

2nd. That his decision, whether regular or irregular, is not subject to any kind of revision; nay, not even in Error.

In addressing you now I have no other object than to prevent any misrepresentation being attempted as to the true issue—an issue in which I am far less interested than most other people. Had I sought my own ease and convenience, I could possibly have obtained the remission of the fine; but it seemed to me that the question involved

should not be so evaded. If the judges collectively arrogate to themselves such privileges as these, the proper remedy is one that shall be of general and not of partial applicability. In a word, if they declare that by law they have powers dangerous to society, why then the law must be changed. To bring about this change the general question must not be lost sight of in the particular. It is not whether under the circumstances the letters complained of ought to be considered a contempt; but whether the complainant can be at once complainant and judge, and this finally, arbitrarily, and without responsibility.

As I shall have other opportunities of entering into the whole merits of this case, it is not now my intention to discuss the various judgments given on the preliminaries of my case; but they have one common feature which I think it right to indicate. All are, and profess to be, exceptions, for which no law is cited, and no serious argument attempted. Contempts, we are given to understand, are cases totally apart from all others—they are not susceptible of definition, and they have no analogies. They are so subtle that no general words will reach them; they are not included in *all* crimes whatsoever, nor I presume in *all* cases whatsoever. Will such a state of things be permitted to outlive for one year the announcement of its existence?"

No one will object to the fullest discussion of the subject, with a view to Legislative interference; but it may here be observed that we have two examples of lawyers modifying the views upheld and expressed in earlier years. One is the judge concerned in this case, who, while Solicitor General, drafted the bill read by Mr. RAMSAY in the course of his argument. The other is Mr. ERSKINE, who, according to Chief Justice DUVAL, when Lord Chancellor, greatly modified the views contained in the letter cited *ante*, page 145.

The elaborate judgments in this case (especially that of Mr. Justice BADGLEY) leave nothing to be said, but we find in the *American Law Register* for January, another authority of some interest. Chancellor KENT, under date 13th March, 1826, writes thus to Mr. LIVINGSTON, criticizing that gentleman's crim-

inal code for Louisiana: "I am entirely against the abolition of the common-law doctrine of contempt, and your substitute I humbly conceive to be wholly inadequate. Your provision is that all contempts are to be the subject of indictment and trial by jury. Now, I beg leave to say that the jury are wholly incompetent to judge of what is or is not decorous or insulting language to a Court. If a judge was called a blockhead or a fool, one-half of the rude vulgar jurors of the country might think it a very smart, and possibly a very true saying. Besides, the remedy by indictment is *too slow*. Must a judge sit and hear the contempt, and wait six months before the trial in a Criminal Court can afford him redress? Besides, you make no provision for insulting gestures, or looks, or actions. You say that if any person by *words*, or by making a *clamor or noise*, wilfully, &c., he may be removed and punished. So, if he use any indecorous, contemptuous, or insulting *expressions*, in the *OPINION OF A JURY*, he is to be punished. So, if he obstruct the proceedings of the Court by violence or threats, he shall be fined, &c. Here is all the provision for contempts. All other contempts are abolished, and all these contempts must be tried on indictment, or information, in the usual form. Now, I say you do not reach a thousand nameless, but gross and abominable contempts, that may be offered in Court. The impudent or malicious offender can, Proteus-like, elude all your rattling chains, and insult with impunity. Insults to a court ought to be punished with the celerity of lightning, and here you wait the slow process of indictment for an open insult to the bench. I never would accept a judicial office under any government, if I was to be left so naked and defenceless as you in this chapter leave the Louisiana judges. It is by far the most exceptionable, the most distressingly exceptionable, part of the penal code."

A case recently before the Court of Common Pleas in England, cited below from the "Law Reports," shows that the English judges do not coincide with Mr. RAMSAY'S views as the recusation of the judge who complains of the contempt. We shall notice McDermott's case, (Law Rep. 1 P. C. 260,) in our next issue.

Officer—Interest in the Justices sitting upon the Inquiry.—A clerk of the peace having received fees to which the justices thought he was not entitled, they withheld a portion of his salary, and upon a mandamus unsuccessfully resisted his claim, and thereby incurred costs, for the payment of which the quarter sessions made an order, which it was the duty of the clerk of the peace to enter on the records of the Court and certify to the county treasurer for settlement. The clerk of the peace, conceiving that the order was illegal, because no full bill of costs had been brought before the Court, and also because he thought the costs were not such as ought properly to be charged upon the county-rate, but should have been paid by the justices who by disputing his claim had improperly incurred them, declined to record the order or to give the necessary certificate. The quarter sessions thereupon referred it to the finance committee, to consider and report what ought to be done under the circumstances; and upon their report a charge was preferred against the clerk of the peace, in the name of the county treasurer, of having "misdemeaned himself in the execution of his office." The matter was heard before the justices at the next court of quarter sessions, and they unanimously found that the clerk of the peace had been guilty of the offence charged against him, and adjudged him to be dismissed from his office, and appointed the defendant to succeed him. In an action by the clerk of the peace, for money had and received, to try the defendant's right to the fees of the office:—*Held*, that the justices in quarter sessions, being a competent tribunal to hear and determine the charge, and having determined it, this Court could not question the propriety of their decision; and that no such interest appeared in the justices, or in any of them, as to disqualify them from acting as judges in the matter. *Wildes v. Russell*, Law Rep. 1 C. P. 722. [In the course of the argument and judgment in this very interesting case, several observations were made having some bearing on the recent contempt case, *The Queen v. Ramsay*. Mr. Bovill, in showing cause against a rule for a new trial, argued that the judgment of a competent tribunal,

good upon the face of it, could not be impeached in the way attempted. He referred to *Carus Wilson's* case (7 Q. B. 984, 1015), an order of commitment for contempt of the Royal Court at Jersey. Mr. Bovill further observed: "The fact of some of the justices present when the matter was heard being members of the committee at whose instance the charge was preferred, cannot affect the validity of the proceeding: *In every case of commitment for contempt, the tribunal ordering the commitment is in some sense deciding in its own case.*" Willes, J., in the course of his opinion, remarked upon this subject: "As to the other point, that they (the justices) were both prosecutors and judges, I cannot bring myself to feel any doubt. As well might it be said that a judge who sees an offence committed before him, and directs a bill to be sent up to the grand jury, ought to withdraw from the bench when the charge comes to be tried. I cannot regard the justices who, so to speak, took notice of the alleged contumacy, and complained of it and suggested the prosecution, as parties to the proceedings." And Byles, J., observed: "Contumacy to the Court may clearly be punished by the Court itself. This case bears a strong analogy to the ordinary case of a contempt of one of the superior courts. There, the judge himself suggests the contempt, and it is inquired into before him. (See the authorities collected in *Ex parte Fernandez*, 10 C. B. (N. S.) 3; 30 L. J. (C. P.) 321.) It would be no objection to a proceeding against an officer of this Court, that it is instituted by order of the Court, although the Court (or a member of it) might have to appoint his successor. *In all cases of contumacy or contempt committed against a court of justice, the proper tribunal to proceed to punishment is the Court itself.*"

THE ROYAL INSURANCE CO. v. KNAPP ET AL.

This case has been withdrawn from the Courts. The plaintiffs have compromised the matter by paying the thieves \$50,000 for the restoration of the stolen property, and the defendants have been discharged from custody. The judgment of Mr. Justice MONK,

therefore, stands unreversed. It is to be hoped that some action will be taken for the purpose of enabling the colony to surrender miscreants who abuse the right of asylum, as Messrs. Knapp and Griffin have done. If larcenies to the amount of \$1000 and upwards were included in the Extradition Treaty, this class of offenders would be reached, and sent back to receive well-merited punishment.

THE CONFEDERATE COTTON LOAN.

The following opinion has been obtained from Sir R. P. Collier, the late Solicitor General, respecting the Confederate Cotton Loan.

The question submitted was as follows: "Whether or not merchants and others, on being sued in England by the Government of the United States, for property or money held by them at the termination of the war belonging to the Southern States, may not successfully plead the confederate seven per cent. cotton bonds as a set-off, to the extent of the amount that each defendant may hold of them?" "Opinion. In the event of the United States Government suing in the Courts of this country for debts due, or property belonging to the late Confederate Government, I am of opinion that defendants, who may be holders of Confederate Cotton Bonds, are entitled to set up a counter claim against the U. S. Government in respect of these bonds. The counter claim will be founded on the principle, that if the United States assert in our Courts claims accruing to them through their succession to the property and rights of the late Confederate Government, they are bound by the liabilities of that Government."

COUNTY OF MEGANTIC.

By proclamation, dated March 16th, the periods of holding the terms of the Circuit Court for the County of Megantic, District of Arthabaska, have been altered, and the terms fixed as follows: Three terms, each of five days, to be held at the village of Inverness, from the 13th to the 17th of March, June, and December, both days inclusive.

BAR OF LOWER CANADA.

The following are the admissions to practice and to study in the District of Montreal, since October, 1866, the date of our last list. It is to be observed that the names of those only are given who have actually received their Diploma on payment of the fees. It will be for the Council to see that gentlemen who aspire to the honor of a Diploma, but refuse to pay their fees, do not practice illegally. We may add here that an effort is now being made to enforce payment of arrears of annual subscriptions due by members. The readiest method would be that adopted, we believe, in Upper Canada, viz., render it imperative on attorneys to take out a certificate at the beginning of each year, without which they would be disqualified from practising.

ADMISSIONS TO PRACTICE.

NAMES.	DATE OF EXAMINATION.	DATE OF DIPLOMA.
Oscar Prévost.....	16th Oct., 1866	30th Oct., 1866
Magloire Desjardins.....	2nd Jan., 1866	11th Dec., 1866
Alphonse Houle.....	16th Oct., 1866	12th Dec., 1866
Louis N. Demers.....	2nd Oct., 1866	12th Dec., 1866
Ferdinand David.....	17th Dec., 1866	19th Dec., 1866
Léon L. Corbell.....	17th Dec., 1866	19th Dec., 1866
Arthur B. Longpré.....	3rd Jan., 1866	5th Jan., 1867
Olivier Augé.....	17th Dec., 1866	30th Jan., 1867
John A. Bothwell.....	17th Dec., 1866	15th March '67
Emery Perrin.....	16th March '67	16th March '67
Guillaume N. L. Beaudry.....	16th March '67	18th March '67
Mofee Corbell.....	16th March '67	21st March '67
Antoine C. H. Frevost.....	19th March '67	4th April 1867
R. A. Ramsay.....	16th March '67	4th April 1867

ADMISSIONS TO STUDY.

NAMES.	DATE OF ADMISSION.
Ed. Cornwallis Monk.....	16th October, 1866.
L. A. McConville.....	17th December, 1866.
Daniel Darby.....	17th December, 1866.
R. Fisher.....	17th December, 1866.
F. David.....	17th December, 1866.
J. A. Oulmet.....	17th December, 1866.
Wm. de Courcy Harnett.....	16th March, 1867.

BANKRUPTCY—ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNER.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Bedard, Elie.....	St. Anne de la Pêrade.....	A. B. Stewart.....	Montreal.....	Feb. 23rd.
Bell, Thomas.....	Lindsay.....	S. C. Wood.....	Lindsay.....	March 13th.
Bellmare, Désiré.....	St. Rami, C.E.....	A. B. Stewart.....	Montreal.....	March 23rd.
Bennett, William, individually and as former co-partner (with Geo. Pickup) of Wm. Bennett & Co.....	Montreal.....	T. Sauvageau.....	Montreal.....	March 12th.
Bergman, Frederick.....	Hamilton.....	W. F. Findlay.....	Hamilton.....	March 11th.
Bernard, Rami.....	St. Hyacinthe.....	T. Sauvageau.....	Montreal.....	Feb. 23th.
Booth, Henry, jun.....	St. Catherine.....	J. R. Armstrong.....	St. Catherine.....	March 9th.
Branchaud, Norbert, individually and as partner of N. & A. Branchaud, and Branchaud & Frère.....	St. Cécile, Valleyfield.....	T. Sauvageau.....	Montreal.....	March 5th.
Brosseau, Edmond.....	St. Rami.....	T. Sauvageau.....	Montreal.....	March 22nd.
Bulmer, Thomas.....	Ingersoll, C.W.....	Philip S. Ross.....	Montreal.....	March 15th.
Cameron, Angus.....	Vankleek Hill, C.W.....	John Whyte.....	Montreal.....	March 26th.
Cameron, Donald B.....	Windsor.....	J. McCrae.....	Windsor.....	March 20th.
Campbell, Daniel James.....	Napawee.....	W. S. Robinson.....	Napawee.....	Feb. 26th.
Carrier, Ferdinand, doing business as F. Carrier & Co.....	Quebec.....	Wm. Walker.....	Quebec.....	Feb. 26th.
Clark, John.....	Township of Fenelon.....	S. C. Wood.....	Lindsay.....	March 9th.
Clinton, Adam.....	Woodstock.....	Jas. McWhirter.....	Woodstock.....	March 26th.
Clinton, James.....	Tilsonburg.....	Jas. McWhirter.....	Woodstock.....	March 27th.
Cochrane, Robert.....	Peterborough.....	George Bell.....	Peterborough.....	March 19th.
Côté, Téléphore.....	Quebec.....	Wm. Walker.....	Quebec.....	March 15th.
Danvers, Joseph.....	Verchères, C.E.....	John Whyte.....	Montreal.....	Feb. 27th.
Dellale, W. H.....	Brantford.....	A. W. Smith.....	Brantford.....	March 13th.
Dobson, James.....	Toronto.....	Thomas Clarkson.....	Toronto.....	March 4th.
Duplessis, Thomas Cyrold.....	Quebec.....	A. Fraser.....	Quebec.....	Feb. 25th.
Ery, Thomas.....	Kingston.....	John Whyte.....	Montreal.....	March 14th.
Forbes, Alexander.....	Hamilton.....	J. J. Mason.....	Hamilton.....	March 13th.
Forbes, Thomas.....	Strathroy.....	Philip S. Ross.....	Montreal.....	Feb. 28th.
Fuller, Joseph.....	Brantford.....	A. W. Smith.....	Brantford.....	Feb. 27th.
Garden, William N.....	Welland.....	James McGlashan.....	Welland.....	March 18th.
Glasford, James.....	Morrisburg, C.W.....	John Whyte.....	Montreal.....	March 5th.
Grant, William W.....	Montreal.....	A. B. Stewart.....	Montreal.....	March 4th.
Greenlee, Robert.....	Owen Sound.....	George J. Gale.....	Owen Sound.....	March 19th.
Gunn, James.....	Ingersoll.....	Jas. McWhirter.....	Woodstock.....	March 26th.
Gunn & Rutherford.....	Ingersoll.....	Jas. McWhirter.....	Woodstock.....	March 23th.
Hall, John H.....	Magog, C.E.....	A. M. Smith.....	Sherbrooke.....	March 13th.
Hall, Lockhart K.....	Stanstead.....	J. L. Terrill.....	Stanstead.....	March 1st.
Haskett, James and Henry.....	London.....	Thos. Churcher.....	London.....	March 20th.
Harper, Richard.....	Guelph.....	E. Newton.....	Guelph.....	March 9th.

ASSIGNMENTS.—(Continued.)

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Higginbotham, Joseph.....	Sarnia.....	George Stevenson	Sarnia.....	March 15th.
Hilton, John.....	Lindsay.....	S. C. Wood.....	Lindsay.....	March 13th.
Hogben, Arthur.....	Toronto.....	W. T. Mason.....	Toronto.....	March 2nd.
Hommel, Joseph A.....	Stanstead Plain.....	J. L. Terrill.....	Stanstead Pl.	March 1st.
Howard, Hiley.....	Hamilton.....	J. J. Mason.....	Hamilton.....	March 6th.
Hunter, Isaac.....	Township of Esquesing.....	John Lynch.....	Brampton.....	March 29th.
Jacobs, Joseph E.....	London.....	L. Lawrason.....	London.....	Feb. 22nd.
Jones, James.....	Township of Saltfleet.....	J. J. Mason.....	Hamilton.....	March 20th.
Joubert, Ambroise David.....	Montreal.....	T. Sauvageau.....	Montreal.....	March 6th.
Kane, John A.....	Amherstburg.....	J. McCrae.....	Windsor.....	March 5th.
Kégle, Moïse.....	Roxton Falls.....	Wm. Coote.....	St. Johns, C.E.	Feb. 22nd.
Kerby, William.....	Guelph.....	Thos. Saunders.....	Guelph.....	March 11th.
Kerr, Dawson, Jun.....	Goderich.....	S. Pollock.....	Goderich.....	March 8th.
Kerr, James.....	Orono.....	E. A. Macnachten	Cobourg.....	March 16th.
Kimball, John Freeman.....	Simcoe.....	A. J. Donly.....	Simcoe.....	Feb. 21st.
King, John.....	Township of Stanley.....	S. Pollock.....	Goderich.....	Feb. 23rd.
Korn, Henry.....	London.....	L. Lawrason.....	London.....	March 11th.
Lapierre, Ernest Alphonse.....	Ottawa.....	Francis Clemow	Ottawa.....	Feb. 12th.
Leadston, Thomas.....	Township of Fullarton.....	Thos. Miller.....	Stratford.....	Feb. 25th.
L'Ecuver, Joseph.....	St. Antoine Abbé.....	T. Sauvageau.....	Montreal.....	March 26th.
McCowbrey, John.....	Sarnia.....	George Stevenson	Sarnia.....	March 14th.
McDermott, Patrick.....	Sarnia.....	George Stevenson	Sarnia.....	March 4th.
McDougall, Robert.....	Toronto.....	Thomas Clarkson	Toronto.....	Feb. 22nd.
McEachern, John D.....	Township of Minto.....	Thomas Saunders	Guelph.....	March 26th.
McGarvey, William.....	Galt.....	Alex. McGregor.....	Galt.....	March 2nd.
McGarvey William H.....	Petrolia.....	W. F. Findlay.....	Hamilton.....	March 18th.
McIntosh, John.....	Toronto.....	Thomas Clarkson	Toronto.....	March 9th.
McKenzie, William.....	Mitchell.....	Thos. Miller.....	Stratford.....	March 25th.
McPherson, Robert.....	Walkerton.....	W. Collins.....	Walkerton.....	March 13th.
Major, Charles B.....	Hollin, C.W.....	A. B. Stewart.....	Montreal.....	Feb. 28th.
Malloy, Peter Watson.....	Brampton.....	John Lynch.....	Brampton.....	March 8th.
Marsh, George F.....	Township of Eldon.....	S. C. Wood.....	Lindsay.....	Feb. 25th.
Marston, George Jacob.....	Ottawa.....	Francis Clemow	Ottawa.....	March 2nd.
Martin, François.....	Montreal.....	f. S. Brown.....	Montreal.....	March 11th.
Morrow, Henry.....	Stratford.....	Thos. Miller.....	Stratford.....	March 11th.
O'Leary, Jeremiah.....	Lindsay.....	S. C. Wood.....	Lindsay.....	Feb. 28th.
Park, Heron.....	Magog, C.E.....	A. M. Smith.....	Sherbrooke.....	March 23rd.
Pattin, Andrew & Co.....	Hamilton.....	W. F. Findlay.....	Hamilton.....	March 8th.
Peter, John Sim.....	Peterborough.....	James Campbell.....	Peterborough	March 4th.
Eipley, Elijah Henry.....	West Farnham.....	John Whyte.....	Montreal.....	March 28th.
Rogers, Amos.....	Newmarket.....	Don. Sutherland.....	Newmarket.....	Feb. 28th.
Rutherford, John.....	Embro.....	Jas McWhirter.....	Woodstock.....	March 26th.
St. Marie, Pierre C.....	Longueuil, C. E.....	T. S. Brown.....	Montreal.....	March 13th.
St. Onge, Damase.....	St. Rém.....	T. Sauvageau.....	Montreal.....	March 11th.
Sanborn, William.....	Tp. of Waterloo, C. W.....	H. F. J. Jackson.....	Berlin, C. W.....	Feb. 25th.
Simon, Seigmund Henry.....	Plessisville de Somerset.....	Wm. Walker.....	Quebec.....	March 15th.
Smith, Richard.....	Collingwood.....	Joseph Rogers.....	Barrie.....	March 28th.
Smith, Malcolm.....	Lindsay.....	S. C. Wood.....	Lindsay.....	March 20th.
Spence, James.....	Brantford.....	A. W. Smith.....	Brantford.....	March 6th.
Starr, Milton Hutton.....	Georgetown, C. W.....	Isaac Hunter.....	Georgetown.....	Feb. 28th.
Stewart, John.....	St. Johns, C. E.....	T. S. Brown.....	Montreal.....	March 6th.
Stocking, Jared.....	Hamilton.....	W. Roberts.....	Hamilton.....	March 26th.
Summers, Andrew.....	Summerstown, C. W.....	John Whyte.....	Montreal.....	Feb. 27th.
Symonds, John.....	London.....	Thos. Churcher.....	London.....	Feb. 27th.
Thomas, John.....	Pictou.....	N. McL. Bockus.....	Pictou.....	March 29th.
Thompson, William A.....	Beaverton.....	James Moffatt.....	Toronto.....	March 21st.
Trudeau, N.....	Township of Roxton.....	J. L. Lafontaine.....	Tp. of Roxton	March 16th.
Way, Palmer and William.....	Sarnia.....	George Stevenson	Sarnia.....	March 23rd.
Webb, Henry E.....	Brighton.....	E. A. Macnachten	Cobourg.....	March 7th.

WRITS OF ATTACHMENT.

PLAINTIFFS.	DEFENDANTS.	SHERIFF'S OFFICE AT	DATE.
Charles G. Waldron.....	{ Jas. E. Haseltine, Richard R. Foote, J. W. Holden, and John M. Gilbert... }	Chatham, C.W.....	Feb. 21st.
Adam Brown, Geo. Hamilton Gillespie, and H. W. Routh.....	Edward Foley.....	Goderich.....	March 11th.
Gore Bank.....	{ Andrew Eaton and James McWhirter..... }	Woodstock.....	March 11th.
John Boyd and John A. Arthur.....	Thomas Mulcahy.....	Barrie.....	March 9th.
James Austin and William Buchner.....	Brooke Lamphrey.....	Guelph.....	March 11th.
William E. Sandford and Alex. McInnes.	Jas. Gunn and Jn. Rutherford	Woodstock.....	March 19th.

TESTAMENTARY BREVITY.—One Charles Breusing, the proprietor, in his lifetime, of the music store at No. 701 Broadway, died in 1863, leaving an estate of \$35,000, and the following will: "When I die, Regina Kaufman shall have all I leave behind me. C. Breusing. A. Hirsch, M. Hirsch (witnesses)." After some years of litigation the will has been declared to be valid.

LAW JOURNAL REPORTS.

PRIVY COUNCIL CASE.

GUGY v. BROWN.

Advocate conducting his own case—Right to fees.

Held, that an advocate of Lower Canada, acting as attorney of record for himself in a suit to which he is a party, is entitled to the usual "attorney's fees."

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Guky v. Brown, from Canada: delivered 1st February, 1867.

Present:

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD TORIN KINDERSLEY.

This case is an Appeal from the Decree of the Court of Queen's Bench for Lower Canada, dated the 19th of December, 1862. By this Decree a judgment dated the 2nd of November, 1861, of the Superior Court of the District of Quebec, was reversed. That judgment was pronounced by a single judge (Taschereau) on a motion made by the present appellant to review the prothonotary's taxation of a bill of costs which had been submitted to him to be taxed, by the appellant, under a prior judgment of the last-mentioned Court upon a proceeding called "an opposition," awarding him costs as against the respondent generally by the words "avec dépens." The question, and the only question, raised and decided in the two Courts was whether the appellant, who was an advocate and attorney duly admitted therein, and had appeared personally in Court and conducted his own case as attorney on record, was entitled under the said judgment to charge in

his bill of costs, and to have allowed, on the taxation thereof against the respondent, certain fees claimed and charged by him in respect of his character of attorney. Judge Taschereau decided in the affirmative; the Court of Queen's Bench in the negative.

The rule for deciding this question, as it was said by C. J. Lafontaine, in *Brown v. Guky* (11 Lower Canada Reports, 407), must be furnished by reference to the French and not to the English law, because the then existing French law was dominant in Lower Canada when it was conquered in 1759, and consequently that law continues to be dominant there, subject to any alterations which have been introduced by Legislative Acts or other competent authority.

It is necessary, therefore, to inquire what the old French law was with reference to this subject.

On behalf of the appellant several authorities were cited, the principal of which are, "Le Parfait Presureur" (Edition 1705), Pigeau, Ferrière, and Serpillon. These are for the most part stated in the appellant's case, and referred to by Mr. Justice Taschereau in 11 Lower Canada Reports, 484-485. And their Lordships are of opinion, in accordance with the opinions of Mr. Justice Meredith and Mr. Justice Taschereau, that the passages cited from these books constitute a preponderance of authorities in the French law, for allowing fees to an attorney who appears as such in his own case.

But it was argued for the respondent, that the old French law has, at all events, been displaced by modern authorities. It is certainly true that although in the case which is the subject of appeal, when in the Superior Court of Quebec, Judge Taschereau adhered to the old French law, and decided the case accordingly in favor of the attorney's claim (see 11 Lower Canada Reports, 493), yet on three earlier occasions the Court of Queen's Bench decided the contrary, in disregard of that law, and held that an attorney conducting his own case is not entitled. Two of these cases were decided by a majority of three to two Judges, in *Brown v. Guky* (11 Lower Canada Reports, 401), and *Guky v. Ferguson* (ibid 409); and a third case of *Fournier v. Cannon*

was cited by Mr. Justice Meredith, in his judgment in the present case (see Record, p. 22), in which he himself and all the other Judges of the Queen's Bench appear to have concurred.

In the judgment now under appeal, Mr. Justice Meredith, although he thought it right to agree with the majority of the Court, declared that his own contrary opinion (expressed in *Gugy v. Ferguson*) still remained unchanged; and Mr. Justice Mondelet agreed in that unchanged opinion, and differed from the other Judges of the Court.

Mr. Justice Aylwin appears to rest his judgment mainly on the argument that the tariff gives fees to attorneys only, and thus in effect denies them to parties who are not attorneys, and that a person who appears in person cannot call himself an attorney. In answer to this it may be observed, that an attorney who conducts his own case, and describes himself on the face of the proceedings not as a party suing or defending in person, but as attorney on record, accepts by that very act all the duties and responsibilities which the practice of the Court imposes on attorneys acting for ordinary clients. Mr. Justice Meredith founds his judgment merely on the propriety of a judge's deferring to the authority of adjudged cases. Mr. Justice Badgley, in substance, takes the same view as Mr. Justice Aylwin, with the addition that he relies on the circumstance that in the case of an attorney appearing for himself, inasmuch as in the proceeding by way of "*inscription en faux*," the law requires a special procuration from the party to his attorney, as the foundation of the proceeding, there would be an absurdity in taking such a special power of attorney from a man to himself; and further, that the proceeding by way of "*distriction de dépens*" would not be practicable, because the occasion for it could never arise. But their Lordships are constrained to observe that they cannot understand how these are good reasons for disallowing to the attorney his fees for services performed in the cause as an attorney.

It will be observed that in no one of these judgments is there any dealing with the authorities cited on behalf of the appellant from the old French law books in favour of the at-

torney's right. The judges do not at all deny that there are such authorities, or attempt to distinguish them. Mr. Justice Duval alone, in his judgment in the earlier case of *Brown v. Gugy* (printed in the appellant's case, page 4), says that the opinion of Serpillon on this point is of little weight, being founded on faulty reasoning only, and quotes a passage from De Jousse, as to the rights of advocates, as a conflicting authority. But Mr. Justice Meredith observed (11 Lower Canada Reports 412), "That authority (De Jousse) is not applicable here in Canada, where advocates are also attorneys. It must be recollected that in France the right of action for fees was not only denied to advocates, but such as claimed them were struck from the Rolls." And this appears to be the only authority which has been cited on behalf of the respondent from the French law books in denial of the attorney's right to fees.

With respect to the argument founded on the Tariff of Fees, the Court of Queen's Bench of Lower Canada is authorized by several statutes to make and establish Tariffs of Fees for the counsel, advocates, and attorneys practising therein. But the object of such a Tariff appears to us to be, not to confer fees on any one, or to deprive any one of them, but simply to fix the amount of them for particular services done by such officers. If at the time of making the Tariff an attorney acting for himself in a cause was, according to the authorities cited by the appellant, entitled to such fees as would have been payable to another attorney acting on his behalf, it surely was not meant by the Tariff to alter the law, and deprive him of such fees altogether, but merely to regulate the amount to be paid to him. On this point their Lordships concur with the view taken by Mr. Justice Meredith in *Gugy v. Ferguson* (11 Lower Canada Reports, p. 418), where that learned judge says, "It is undeniable that the appellant is an attorney, and that he has performed certain services in this cause for which, when performed by an attorney, the Tariff allows certain fees; and I really cannot see anything in the law, or in reason, to prevent the appellant, an attorney, from receiving the fees usually incident to the services which he performed."

But it is intimated in the judgment of C. J. Lafontaine, in *Brown v. Guty*, and asserted in the judgment of Mr. Justice Aylwin in the present case, that the practice has been to disallow fees to attorneys conducting their own cases. And if this practice had been shown to be uniform and long-established, it would certainly have gone far to prove that the old authorities were not to be relied on.

But there appears to be some mistake on this subject; for it is said by Mr. Justice Meredith, in *Guty v. Ferguson* (11 Lower Canada Reports, 418), "The practice in this country may, I think, be said to be in favour of the attorney. The Prothonotary of the Superior Court, an officer of great experience, informs us that in the time of Chief Justice Sewell fees in such cases were not allowed; but that in the time of Sir James Stuart the practice was to allow them; that the last-mentioned practice has continued ever since; and he has given us a note of four cases in which attorneys appearing in their own cases have been allowed their fees. Under these circumstances I think it doubtful whether any change in the practice as to this matter ought to be made, and that if a change were determined on, it ought to be made so as not to affect pending causes."

Whether the Court of Queen's Bench might lawfully alter the law under the statutory power conferred by the Consolidated Statutes, cap. 77, sec. 15, "to make and establish such rules of practice as are requisite for regulating the due conduct of the causes, matters, and business before the said Court," it is unnecessary to decide; for the Court has in fact made no such rule, nor has the law been altered by any legislative Act, or other competent authority.

We therefore think it was the duty of the judges of the Court to administer the old French law, and that they could not alter it, or decline to apply it, on grounds of supposed expediency, as they appear to have done in the judgment in the present case, and the preceding cases on which that judgment was founded.

For these reasons, their Lordships will advise Her Majesty that it should be reversed.

Their Lordships do not think it should be

reversed with costs, because the appellant had a full opportunity of bringing the point before this Committee, and of obtaining their judgment when the former case of *Brown v. Guty* was before them (2 Moo. N. S., 341). Had the present appellant then prosecuted his cross appeal, the question which is the subject of the present appeal would have been then decided. His neglect to do so has been the occasion of the costs of this appeal having been incurred; and their Lordships therefore think he ought not to be allowed them."

SUPERIOR COURT.

February 28th.

CAMPBELL v. THE LIVERPOOL AND LONDON INSURANCE COMPANY.

Insurance—Notice to Insurer of change in occupation of premises insured.

A policy of insurance contained a clause stipulating, that in the event of any change in the occupation of the premises insured, of a nature to increase the risk, the insured should be bound to give notice thereof to the company in writing. The premises were occupied as a saloon, without notice to the Company. A fire having occurred, and an action being brought on the policy:—

Held, that the insured having failed to give notice in writing of the change in the occupation of the premises, could not recover.

Held, also, that the insurers alone were the judges as to whether there was a greater or less risk incurred by the occupation of the premises as a tavern or saloon.

This was an action to recover under a policy the loss sustained by fire. The case was tried before *Smith, J.*, and a special jury, on the 12th of May, 1866, and a verdict was found in favor of the plaintiff. The plaintiff moved for judgment on the verdict, and the defendants moved to set aside the verdict, and for judgment in their favor *non obstante verdicto*.

BERTHELOT, J. The plaintiff brings the present action, as representative of J. C. Frank, for \$3,000, amount of insurance effected 4th November, 1861, on a building described in the policy as a four tenement house, situate at the corner of Pinnacle and Front Streets, Belleville, C.W. This build-

* We are indebted to Mr. I. T. Wetherapoon, of Quebec, for a copy of the above judgment.

ing was destroyed by fire on the 13th of January, 1865. The defendants having refused to pay the amount claimed, the plaintiff instituted the present suit on the 7th of July, 1865. Several pleas have been filed, but the one on which the present contestation turns is that by which the defendants invoke the second condition on the back of the policy or contract of insurance. By this condition it is stipulated that in the event of any change in the occupation of the buildings, of a nature to increase the risk, the insured should be bound to give notice thereof in writing to the Company, and to pay an additional premium, in default of which the policy would be null. There is no doubt that such a condition is a part of the contract which must be strictly observed. On this plea the plaintiff has joined issue by answering that there had been no change of occupation of a nature to augment the risk, and that the Company had no right to an additional premium. That after the insurance had been effected several changes of occupation had taken place with the consent of the defendants, among others, that these buildings had been occupied as a vinegar manufactory immediately before their occupation as a tavern, and that the defendants had sanctioned this occupation as a vinegar manufactory, which was more dangerous than a tavern. That the defendants, or their agent at Belleville, Mr. Chandler, knew that the premises in question were occupied as a tavern, and that the insurance was renewed on the 4th November, 1864, on payment of the same premium.

The case was submitted to a jury, on a suggestion of facts embracing the whole contestation, and more especially on the two points which now constitute the only points in dispute, viz., 1st. Whether the occupation of the premises as a tavern increased the risk; 2nd. Whether the defendants, directly, or by Mr. Chandler, their agent at Belleville, had consented to this occupation, so as to preclude them from invoking the second condition above mentioned. Ten of the jury replied to the seventh question, that the premises had been occupied as a vinegar manufactory long before the 4th of January, 1864, and that this risk was as great as that of a tavern. But this cannot

serve as a ground for deciding the point raised between the parties, for the Insurance Company might have permitted a vinegar manufactory, or closed their eyes to this fact, and yet have a perfect right to complain of the occupation of the premises as a tavern. The Company alone were the judges as to whether there was a greater or a less risk incurred by the introduction of a tavern, and so long as the Company were not notified of the fact in writing, or did not do anything equivalent to an admission of the change, they preserved their right.

To the 8th question: "Was the Company or its agent, at Belleville aforesaid, notified or aware, before the occurrence of the said fire, and how, of the occupation of the said buildings and premises as a tavern?" ten of the jurors answered, "there is no evidence of the Company having been notified of its being occupied as a tavern, *but we think the agent was aware of it.*" The latter part of this answer is but little satisfactory, and expresses a great deal of doubt in the minds of these ten jurors.

To the 9th question, they replied that the substitution of a tavern for a vinegar manufactory did not increase the risk to an extent to justify an increase of premium. I have already said that it was for the defendants alone to decide, whether the risk was thereby increased or diminished.

The several answers of the jury being in favor of the plaintiff, the defendants have been compelled to move that, notwithstanding the verdict and the answers of the jury, judgment be rendered in their favor. Two questions, of law and of fact, present themselves for decision. On whom did it devolve to determine and to say whether the occupation as a tavern was more dangerous, and gave rise to the payment of an additional premium? The renewal of the insurance by the payment of the premium in November, 1864, should be considered a new insurance effected on that day. A few authorities will show what was the duty of the insured, who must be supposed to have given, or who should at least have given on that day a description and designation stating the new occupation. Pothier, No. 199. "L'obligation que la bonne foi impose aux parties, de ne rien dissimuler de ce qu'elles savent sur

les choses qui sont de la substance du contrat, ne concerne ordinairement que le for de la conscience. Il en est autrement de l'obligation qu'elle impose à chacune des parties, de ne pas induire l'autre *en erreur*, par de fausses déclarations sur les choses qui sont de la *substance* du contrat : celle-ci concerne le *for extérieur*. Ces fausses déclarations peuvent donner lieu, dans le for extérieur, à faire prononcer la *nullité* du contrat." "Cela a lieu quand même l'assuré aurait fait, *sans mauvaise foi*, cette fausse déclaration, *étant lui-même dans l'erreur*. Car il y a cette différence dans tous les contrats *intéressés*, entre le cas auquel l'une des parties ne dit pas ce qui est, et le cas auquel elle dit ce qui n'est pas. Dans le premier cas, elle n'est pas tenue de ne l'avoir pas dit, si elle ne le savait pas ; mais dans le second cas, elle est tenue, si ce qu'elle a dit ne se trouve pas véritable, et a induit l'autre partie en erreur ; *debet prestare rem ita esse ut affirmavit*."

Boulay-Paty on Emérigon, Vol. 1, pp. 16, 17. "On est coupable de dol vis-à-vis des assureurs non-seulement lorsque, pour se procurer des assurances, ou pour les inviter à se contenter d'une *prime moindre*, l'on affirme ou l'on fait entendre des faits contraires à la vérité, mais encore lorsque l'on dissimule des circonstances graves qu'il leur eut été important de connaître avant de souscrire la police."

Quenault "Assurances Terrestres," No 374. "L'erreur qui tombe sur la substance de l'objet du contrat est en effet par elle-même une cause de nullité. Or, on doit regarder comme substantielles dans le contrat d'assurance, toutes les circonstances qui peuvent augmenter ou changer les risques dont se charge l'assureur. L'opinion du risque est ce qui détermine le *consentement de l'assureur* : si la spécification de la chose assurée et des risques, faite par l'assuré dans la police, n'en a donné qu'une fausse opinion à l'assureur, l'assurance doit être annulée, *comme n'ayant été consentie que par erreur*." Lastly, I shall cite from Boudousquie "Traité de l'Assurance contre l'Incendie," No. 111. "L'assuré doit donc déclarer, à l'assureur, la nature des objets qu'il fait assurer, celle des constructions, la destination des bâtimens, les professions qu'on y exerce, les denrées ou matières *hasar-*

deuses qui y sont renfermés, leur communication, leur rapprochement ou leur réunion avec d'autres bâtimens ou d'autres objets d'un risque plus grave." It was then, by law, the duty of the insured to make known the change of *profession*, or change of occupation which had taken place, at the time of the renewal of the insurance in November, 1864. It was, according to law, for the Insurance Company alone to determine whether they would charge a higher premium for a tavern than for a dwelling or a vinegar manufactory.

And now as to the question of fact and evidence laid before the Jury. It has been clearly proved that the occupation of a house as a vinegar manufactory does not occasion an increase of premium, and consequently no presumption unfavorable to the defendants arises from the fact that they were aware that, previous to the occupation of the premises as a tavern, they had been used for a vinegar manufactory. It has been equally proved, beyond a doubt, by various insurance agents, that the occupation as a tavern invariably causes an increase of premium, and I may add that this is a fact very generally known by all those who have premises to insure.

There only remains the consideration of the pretension that Mr. Chandler, the defendant's agent, was aware or should have been aware on the day he consented to the renewal of the insurance in November, 1864, that the property, or part of the property was occupied by one Crouetas as a tavern or saloon, which knowledge, according to the plaintiff's pretensions, would deprive the defendants of the benefit claimed by them from the change of occupation of the premises, and from the absence of any notification in writing to them of this change. On this head we have the evidence of Mr. Chandler, which evidence has not been controverted. Mr. Chandler expresses himself in these terms: "Two or three days after the fire I first heard of the said premises being occupied as a tavern. I swear I never heard of it, never had any intimation of it; did not know of it in any way before. Had Mr. Frank notified me in writing or informed me of a change in the occupation of the said premises, and that there was a tavern there, I

should have charged extra, and notified the office in Montreal of it. I would have charged him, had it been left to myself, 7s. 6d extra or 10s, according to the new tariff." This positive statement of Mr. Chandler is to some extent confirmed and strengthened by the testimony of Mr. Frank on the same point: "It is not at all likely that I sent, I may say I never did send, a notice in writing to the Company that the house in question was occupied as a grocery and saloon. I gave no notice in writing to that effect. I think I gave a verbal notice, I would not positively swear I did." The continuation of Mr. Frank's testimony on this point shows that he has no recollection of having given such notice, nor of the place where he gave it, and he ended with this expression, "I cannot call the fact to mind at all."

There is, nevertheless, the latter part of the answer of the ten jurors to the 8th question quoted above. This part of that answer is as weak as the part of Mr. Frank's evidence just cited. It is only the sequel to it, for there is nothing in the proof which can justify this answer in the face of the precise testimony of Mr. Chandler on this point.

It is proper to observe that Mr. Chandler, agent of the Company, took exception to the fact that he had not received notice in writing of the new destination or occupation of the premises, in the first conversation which he had after the fire—only a few days after,—with the plaintiff's brother, Mr. A. A. Campbell. The latter reports their conversation on the subject.

From all that has been stated above, we must necessarily come to the conclusion that the defendants, and their agent, Mr. Chandler, had never been notified in writing according to the second condition on the back of the policy; and there is no evidence that Mr. Chandler was aware that the tavern of Crouet had replaced the vinegar manufactory. Even if he had known it, this would not have prevented the defendants from invoking the second condition of the policy, which imposed on the insured a formal obligation to give notice in writing of any change in the premises insured, which was of a nature to increase the

risk of the insurers. See Quenault, pp. 62, 63, 64. Nos. 74, 75.

As to the waiver resulting from the Insurance Company making other objections, there was nothing to prevent the defendants from invoking other grounds of objection, according to the principle of French law, that the debtor may at any stage of the case oppose every exception or ground of exception which avails him. Moreover, in the case of Barsalou vs. Royal Insurance Co., L. C. Reports, a pleading of the same kind was admitted and allowed, after the defendants had filed other exceptions which they afterwards abandoned.

Verdict set aside, and judgment for the defendants.

J. J. C. Abbott, Q. C., for the plaintiffs.

S. Bethune, Q. C., for the defendants.

COURT OF QUEEN'S BENCH.—APPEAL SIDE.

MARCH 5TH.

IRELAND, (plaintiff in the Court below)
Appellant; and DUCHESNAY ET VIE,
(*Hiers-saisis* in the Court below) Respondents.

Practice—Husband and Wife—"Party in a cause"—C. S. L. C., cap. 82, sec. 14, 15.

Held, that the husband of a *marchande publique séparée de biens* by marriage contract, who is merely brought into the cause to authorize his wife, is not a "party in a cause" within the meaning of C. S. L. C., c. 82, s. 15, and cannot be examined as a witness for or against his wife.

The rule of law, prohibiting husband and wife from being examined for or against each other in civil cases, suffers no exception in the case where the husband is the agent of his wife, a *marchande publique*, and sole manager of her business under a power of attorney.

This was an appeal from a judgment rendered in the Superior Court at Montreal, by *Berthelot, J.*, on the 31st May, 1865, dismissing the plaintiff's contestation of the respondents' declaration on a *saisie-arrest*.

The plaintiff, having obtained a judgment against one William Maume, took out a *saisie-arrest*, attaching goods and moneys belonging to the defendant in the hands of Marie

at the time of accepting the draft he had not in his hands any goods or moneys of the defendant.

To this action the defendant pleaded a declinatory exception, alleging that he was wrongly impleaded, inasmuch as he had his domicile in Upper Canada, as appeared by the writ of summons and process in the cause; that moreover it appeared that the cause of debt originated in Upper Canada, and that the action under such circumstances was cognizable only by the tribunals of Upper Canada.

The case was submitted on the following admissions: "The parties admit, but only for the purposes of the issue joined on the *exception déclinatoire*, that the flour referred to in the plaintiff's declaration, was consigned from Paris in Upper Canada, by the defendant to the plaintiff for sale to be made, and that the same was by the plaintiff sold in Montreal; that the draft referred to in the declaration was drawn after said consignment against the said consignment of flour, and that the money sought to be recovered by plaintiff was by him paid upon the said draft at Montreal, and that at all the times mentioned in the plaintiff's declaration, the defendant resided in Upper Canada. That the said consignment, draft or bill of exchange and payment as above mentioned, set forth in the two counts of plaintiff's declaration before the third count thereof, constituted for the purpose of the said exception the sole cause of indebtedness which the plaintiff pretends to claim from the defendant by the present action. That the paper writing herewith filed by the plaintiff, is a true copy of the sold note of the said flour." The declinatory exception being dismissed, the defendant appealed.

Laflamme, Q.C., for the appellant. The whole question was a question of law. That the draft constituted the only cause of indebtedness of the appellant to the respondent was admitted. If so, the only question was and is, to determine: Where is the contract made between the drawer and drawee on a draft? If it be at the place where it is dated and signed, as the appellant asserts, then the judgment of the Court below is unquestionably wrong.

Riichie, for the respondent. The only ques-

tion in this appeal is, what was the cause of action? The respondent submits that the causes—and the only causes—of action were the receipt by him of the flour, its sale and the overpayment made by him, all at Montreal. The draft is not one of the causes of action—it is merely a piece of evidence of the amount paid. The plaintiff's action is complete without it. The fact that the appellant, for his own convenience, gave an order for payment dated in Upper Canada, is one of no importance as affecting the question of jurisdiction. The liability of the appellant to make good an amount paid for him at Montreal, without consideration, arises out of the relations existing between him and the respondent, as his agent. It was within the jurisdiction of the Superior Court at Montreal that the liability of the respondent as a factor commenced—that his duties as such were performed, and that he paid the sum sought to be recovered by his action in the Court below. The position of the respondent cannot be made worse than it otherwise would have been, merely because an order affording him ready means of proving the payment made by him in Montreal happens to be dated in Upper Canada.

AYLWIN, J. This was an action brought in Montreal against the appellant as a person resident at Paris, U. C. The plea is by *exception déclinatoire* to this effect: That the defendant was wrongly impleaded, inasmuch as he had his domicile in Upper Canada, and the cause of debt originated there. But it appears that there has been an admission in these words: (His Honour read the admission stated above.) Now, in consequence of this admission, the question does not arise at all, and therefore the judgment was perfectly right, and must be confirmed.

DEUMMOND, J. I must say that my first impression was that the cause of action arose in Upper Canada, because the draft was signed there; but on looking the case over, and seeing the admissions, it appears clearly to me, that the draft was only incidental, and that the transactions in Montreal really constituted the cause of action.

BADGLEY, J. In the first place, the consignment in itself only becomes a cause of action when it is received by the consignee,

and even then, the action would be by the consignor against the consignee to account and pay for the goods. This point is not applicable here. In the next place, the mere order for the payment of money, or draft, only becomes contractual upon its acceptance by the drawee here, and its payment here by the latter is necessarily the cause of action, not the mere order in itself from Upper Canada. The draft is mere blank paper till accepted. Then it becomes a contract. It is the payment of the money in Montreal by the drawee for the profit and advantage here of the drawer, which makes up the cause. So that the cause of action being the acceptance here by the drawee, and the payment here by him, in excess of drawer's funds in hand, the plaintiff was right in bringing the action here, and, therefore, the declinatory exception was properly dismissed. My opinion is to confirm the judgment.

MONDELET, J., concurred.

R. & G. Lafamme, for the Appellant.

Rose & Ritchie, for the Respondent.

Dec. 5, 6, 1866.

BEAUDRY (plaintiff in the Court below) Appellant; and CORPORATION OF MON. TREAL (defendant in the Court below) Respondents.

Practice—Appeal—Interlocutory Judgment—Inscription en faux.

Held, that a judgment dismissing an inscription *en faux* on a *défense en droit*, is an interlocutory judgment in the cause, and the appeal therefrom should be prosecuted as from an interlocutory judgment.

Motion *nisi causa* on the part of the plaintiff to be permitted to appeal from an interlocutory judgment rendered 30th Nov., 1866, by the Superior Court on a *défense en droit* dismissing the inscription *en faux* filed by the plaintiff, against a certain certificate, dated 9th Feb., 1865, signed by the prothonotary. This certificate stated that the defendants had deposited in the hands of the prothonotary the sum of \$2730, for compensation for land, the property of the plaintiff, which the defendants pretended they had acquired by expropriation.

An objection was raised that there was no necessity for obtaining a rule to show cause why a writ of appeal should not be granted,

inasmuch as the judgment in question was a definitive judgment. C. S. L. C., cap. 77, sec. 20.

The following was the judgment.

MONDELET, J. I do not exactly dissent. The inscription *en faux* is an incident in the suit, but in this case the *pièce* inscribed against being the foundation of the action, of course when the judgment dismissed the inscription *en faux*, it seems to me it was a final judgment, with respect to the inscription *en faux*. I am told, it makes no difference, since permission to appeal is prayed for. But what I am afraid of is that the line of demarcation between final judgments and interlocutory judgments will be altogether removed.

BADGLEY, J. I think it is a mere *question de mots*. So far as the inscription *en faux* is concerned, it in fact may be the real issue in the case; but the judgment upon the *faux*, though a final judgment upon the *faux*, is not a final judgment in the cause within the technical meaning of the Statute. Therefore, though we call it a final judgment *en faux*, it is nothing more nor less than an interlocutory judgment in the cause. This being so, how are you to proceed? Is there an appeal from it? The Court in *Perrault and Simard*, held that it was appealable, and I have no wish to disturb that judgment, particularly as it is in accordance with my own opinion. The judgment, then, not being a final judgment, you can only come at it as an interlocutory judgment.

ATLWIN, J. We are only giving the same decision that was given fourteen years ago by Justices Stuart and Panet.

DRUMMOND, J. I do not see how a final judgment upon an incident can be considered a final judgment in the cause.

Motion granted, and appeal allowed.

C. A. Leblanc, for the Appellant.

H. Stuart, Q. C., for the Respondents.

[IN ERROR.]

March 6, 7, 8, 9.

RAMSAY, Plaintiff in Error, v. THE QUEEN, Defendant in Error.

Contempt of Court—Recusation of Judge—Writ of Error—Appeal.

Held, 1st. That a judge, who has rendered judgment in a case of contempt of Court, is

not subject to be recused in any subsequent proceedings in the same cause, even where he was the complainant in the cause.

2nd. That no writ of error lies from the judgment in a case of contempt.

Leave to appeal to the Privy Council from these judgments refused, though the Attorney General consented.

This case came up on Writ of Error from a judgment of Mr. Justice Drummond, holding the Court of Queen's Bench, Crown side, at the last term of the said Court, for the district of Montreal, on a rule for a contempt of the Court of Queen's Bench by the plaintiff in error, in publishing two articles in the *Montreal Gazette* of the 27th and 28th of August last. (See *ante*, p. 121.)

It was submitted by the plaintiff in error :

1st. That the rule shows no offence known to the law.

2nd. That even if the rule did set forth a contempt, it was an offence which this Court, as now constituted, had alone the power to take notice of, at its term held from the 1st to the 9th days of September, and that this Court, as constituted, not having taken any notice thereof, the said pretended offence was passed over and condoned, and it was not competent for any single judge of Assize, on the Crown side of this Court, afterwards to take up the said pretended offence, and to deal with it.

3rd. That as no man can be a judge in his own cause, and as Mr. Justice Drummond was himself the complainant, he was precluded from sitting or giving any judgment on the said rule.

4th. That the said rule does not allege that plaintiff in error wrote the said letters in question.

5th. That it is not alleged in the said rule where this pretended contempt was committed, and it does not appear that this Court has any jurisdiction in the premises.

6th. That the said pretended contempt not being in face of the Court, the rule should have been supported by affidavit, which it is not.

7th. That the said pretended rule was not under seal as required by C. S. L. C., c. 77, sec. 73; and the absence of seal in writs and process issuing out of this Court on the Crown

side is not covered, as in the case of writs and process issuing out of this Court on the Civil side.

March 6.

PRESENT—Duval, C. J., Aylwin, Drummond, Badgley, and Mondelet, JJ.

Mr. Ramsay. Before proceeding to the merits of this case I recuse Mr. Justice Drummond. He is incompetent to sit in this case for two reasons—one statutory and the other derived from general principles. 1st. Because he gave the final judgment in this case in the other Court. On this point the statute is express. By sec. 7, Consolidated Statutes of Lower Canada, cap. 77, it is laid down who shall be the judges of this Court "in appeal and error," while section 8 is in these words: "No judge of the Court of Queen's Bench shall be disqualified from sitting in any case, by the mere fact of his having been a judge of the Court whose judgment is in question, while such case is there pending, *unless he sat in the case at the rendering of final judgment*," &c.

This legislation is doubtless borrowed from the French ideas on the conformation of Courts of Justice, in this respect much more sound in principle than the English common law notions on the subject; for in England a judge may sit in error on his own judgment. But in any case the statute leaves no room for doubt,—the judge who rendered the judgment attacked cannot sit either in error or in appeal. The second point is that Mr. Justice Drummond is the party complainant in the cause. The rule of English law on this point is most decided. Chief Justice Hobart, in the case of *Day and Savage*, said that a statute which declared a man should be judge in his own case would not be binding. Coke said the same thing in *Bonhams* case, 8 Co. And so did Lord Ch. J. Holt in the case of the *City of London v. Wood*, 1 Strange 674. The general principle too is to be found in the 1st Inst. 141.

[MONDELET, J. Mr. Justice Drummond's name is not in the case.]

No; but it is the same thing, if he be interested, whether his name appears or not. And it does not signify whether the entering of the judgment be a mere form. *The Company of*

Mercers and Ironmongers of Chester v. Bowker, 1 Strange, 640; nor if the interest be ever so small; it is the inconsistency of the thing the law forbids. *The City of London v. Wood*, 1 Strange, 674. *Hezekiah v. Braddock*, 3 Bur. p. 1858, where the judgment of the whole Court was given by Lord Mansfield, p. 1856. Nor is it necessary that the judge be nominally a party, if he have a bias—p. 1856. And the rule applies equally to judges and jurors—p. 1858. And so when the defendant was accused of saying of a Justice of the Peace, "He is an old rogue for sending his warrant for me," C. J. Holt said, "He deserved to be bound to his good behaviour, though it be not proper for that justice to do it; but rather to get one of his brothers to do it for him." *R. v. Lee*, 12 Mod. p. 514. There is no exception to this rule in matters of contempt. In Mr. Driecoll's case, Mr. Justice Rolland, the senior judge, was not on the Bench on the 28th of March, 1854, when Mr. Justice Aylwin took notice of it first. He sat, but took no active part in the proceedings the day the rule was read, and he was not on the Bench at all when the case finally came up.

[AYLWIN, J. Mr. Justice Rolland did take part.]

I read from a report made at the time, which Mr. Justice Drummond admitted to be a good report.

(The entry book was procured, and it maintained Mr. Ramsay's assertion.)

[DUVAL, C. J. Do you know of no case where a judge took notice of an attack on himself out of Court?]

I believe not; but, at all events, he never moved himself to avenge himself. It must be on the motion of a person disinterested, not of the judge himself. I shall now show that a judge cannot act in his judicial capacity if he be a witness. *Hacker's case*, Kelynge, 12; 5 Howell, St. Tr., 1181, 2; St. Tr. 384; *Hawkins*, book 2, cap. 46, sec. 84; 1 Chitty, 607. This case is much stronger, for a judge was actually complainant and witness: "To pass from the law of the question to the ethical view of the case, what advantage can be gained by the opinion of a judge whose judgment carries no moral weight? What moral weight could Mr. Justice Drummond's judgment in this case

carry with it? To say that a judge can move himself to give judgment for himself, is to contradict the terms of his official oath, by which he swears neither by himself nor any "other, privily or apertly, to maintain any plea or quarrel hanging in the Queen's Court, or elsewhere in the country." This case furnishes an example of the dangers of infringing these rules. When Mr. Justice Drummond was Solicitor General, he introduced a bill declaratory of the law of contempt.

[DRUMMOND, J. Is that in the Statute book?]

No, it was dropped, but I intend to show by it that Mr. Solicitor General Drummond, when he had no interest, held in the most solemn way directly the reverse of what he held the other day when he was interested.

Mr. Ramsay read the Bill, which was as follows:

NO. 257—BILL.

"An Act declaratory of the Law concerning contempts of Court in Lower Canada:

"Whereas doubts have arisen as to the powers and jurisdiction of the Courts of Lower Canada in matters of contempt, and it is expedient to remove such doubts;

"Be it therefore declared and enacted, &c., and it is hereby declared and enacted by the authority of the same, that the power of the several Courts of Justice in Lower Canada to issue attachments and inflict summary punishments for contempts of Court, *does not extend, and shall not be construed to extend* to any cases except the misbehavior of any person or persons in presence of the said Courts, or so near thereto as to obstruct the administration of justice—the misbehavior of any of the officers of the said Courts in their official transactions,—and the disobedience of or resistance to any lawful writ, process, order, rule, decree or command of the said Courts by any person whomsoever."

[DRUMMOND, J. That bill was dropped because we all thought in Council that it went too far.]

Of course I cannot know except from what Mr. Justice Drummond says, why it was dropped; but I supposed it was owing to the burning of the Parliament Houses in 1849, two or

three nights after it had been read a first time. It was a very carefully drawn bill, almost in the words of many of the authorities, and I cannot believe it was prepared without care.

[DRUMMOND, J. It was copied from some American acts, and people there regret they had ever been passed.]

Since opinions are to be stated, I think it is a great pity this one had not been passed, for it would have obviated some proceedings which certainly have not been conducive to the interests of justice. I now conclude this preliminary argument, by repeating that Mr. Justice Drummond is incompetent to sit by the statute and from bias.

C. A. V.

March 7.

DUVAL, C. J. In this case the statute, instead of being in favor of the plaintiff in error, is against him. We were referred to sects. 7 and 8 of cap. 77, Con. Stat. of L. C., but the law on the subject is to be found in sec. 56. Sections 7 and 8 refer to civil cases, sec. 56 to criminal cases; and the disqualifying condition is not to be found in the latter. The reason of this must be that in criminal cases it was left to be decided by the English law. As for the question of bias, we do not decide anything as to the merits; but we say that if it be a contempt of Court, Mr. Justice Drummond has a right to sit.

AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

Recusation dismissed.

Mr. Ramsay filed an exception to the judgment, and moved, by consent of the Attorney General, to be allowed to appeal to the Privy Council.

DUVAL, C. J.: Have you any right of appeal to the Privy Council?

Mr. Ramsay: If I have on the merits, I have on the interlocutory, unless the other party objects. The only reason of the consent of the Court being required in an interlocutory is that cases may not be unnecessarily hung up by appeals which might be decided on the merits. When the competence of the Court is a matter in issue, it seems peculiarly favorable for an appeal, more particularly in cases like this where it is desirable that as little scandal should be caused as possible.

Right to appeal refused, MONDELET, J., dissenting.

When the case was called, Mr. Ramsay moved to discharge the inscription likewise with the consent of the Attorney General. He said that the Court could not interfere, that the Crown was *dominus litis*; if not, who was? It had been declared by the Court that morning that it was not Mr. Justice Drummond. If it was the Queen, she was represented by the Attorney General. In the case of the Queen and Howes, 7 A. and E., it was held by *Dewan*, C. J., and four of the judges, that if the Crown did not join in error the prisoner must be discharged. It had always been so held for misdemeanours, and they could not see what else they could decide in a felony.

DUVAL, C. J., said he did not recognize the authority of the Attorney General to abandon a proceeding for contempt.

Mr. Ramsay. He can even for a felony; *a fortiori* for a contempt, which is only a misdemeanor.

Motion to discharge inscription refused, MONDELET, J., dissenting.

Mr. Ramsay excepted to the judgment, and moved again to be allowed to appeal to the Privy Council.

Motion refused, MONDELET, J., dissenting.

Mr. Ramsay then proceeded to argue the case on the merits.

[DUVAL, C. J.: There is a preliminary question which should be settled. Have you a Writ of Error in a case of this sort?]

I am quite prepared for that objection. I have only found one case—the Earl of Devonshire, where a Writ of Error was allowed to the House of Lords for a contempt in the King's Palace. But apart from that, our statute is express—C. S. L. C., cap. 77, Sec. 56. It says that there shall be a writ in *all* criminal cases. Here there can be no clashing of clauses, for it is the criminal clause referred to by the Chief Justice this morning. The statute only confirms the common law. None of the authorities say that in cases of contempt there shall be none. And why should there be a distinction? The object of a Writ of Error is to examine as to the regularity of the form of the proceedings. The Chief Justice seemed to think yesterday that jurisdiction

might be enquired of as against the higher courts of law even on *habeas corpus*. This seemed to be conceding more than I asked, more than I could agree to. Now, if the proceedings had no kind of form, would they be beyond the reach of the Writ of Error? To take an illustration from the circumstances connected with this very case: Mr. Justice Drummond took a rule before this one. In form it was an order to the Clerk of the Court to issue a rule. I showed it to Judge Drummond, and he asked me if it might be amended, which I consented to, and signed the amendment.

[DUMMOND, J. This has nothing to do with the case. It was one of those conversations—confidential conversations—which formerly took place between the representative of the Attorney General and the Judges, and bringing it forward now will perhaps put the Judges on their guard.]

If it puts Judges on their guard to prevent them doing what is wrong so much the better; but this observation contains an insinuation against my character which I must answer. It is a most unfounded insinuation that there was any breach of confidence in my allusion to that first rule. How could there be a confidential communication between the Judge and me as to the prosecution of myself? How could there be any secret as to a matter of record? I think it is very unwise of Mr. Justice Drummond to wish to conceal that matter; there was nothing disgraceful to him in the proceeding, and I have only mentioned it as an illustration of such error as might occur in a rule. But since the mention of the particular case is offensive to any one, I shall generalize and say, suppose a rule was of the nature mentioned, could it not be reviewed in error? To take another illustration from this case. Suppose the rule was in no case? Or suppose a seal was required for authentication, and there was no seal? I put my argument in the form of a perfect syllogism. There may be a writ of error in *all* criminal cases. This is a criminal case. My minor is admitted, my major is in two lines of a Statute. It will be for those who try to deprive me of my remedy to establish the exception which is not in the Statute.

The case was taken *en délibéré* on the question of whether a writ of error would lie.

March 9.

MONDELET, J. This case is one of vast importance to the interests of public justice, to the bar, and to the public. Judges, it is true, must be protected in the discharge of their duties; but I cannot see that it is necessary for their protection to put an end to free criticism of their acts. If they are honest, they have no reason to fear free discussion. At the present moment we have not to decide whether or not there has been a contempt of this Court. The only question is as to whether a Writ of Error lies from a judgment for contempt. Some authorities may be cited, perhaps, to show that there is no way of examining a judgment for contempt; but on turning to our Statute (C. S. L. C., cap. 77, Sec. 56) I find that a Writ of Error lies to this Court "in all criminal cases before the said Court on the Crown side thereof, or before any Court of Oyer and Terminer or Court of Quarter Sessions." Now the only question in the case now before us is, is this a criminal case? It must be either a criminal or a civil case? There cannot be any case which is neither the one nor the other. Cases are but of two kinds: civil and criminal, and the Writ of Error lies in both. How then can we create an exception? Is it because there are no cases in the English books? But that cannot control our Statute—the Statute constituting this Court. As for the argument of inconvenience, it will not do for me. It may be inconvenient to have a judgment revised; but it must be likewise very inconvenient to be sent to jail or fined illegally. But is there any such inconvenience? I have nothing to do with the definition of contempt to-day; but if anything is said on that subject I may have something to add. But whatever may be the nature of the offence, how can it be more inconvenient to allow a writ of error in the case of a contempt than of any other offence? To say that in cases of contempt a writ of error lies is not so utterly absurd as some would have us believe, for the Lords of the Privy Council have recently ordered a record in a case of contempt in British Guiana to be sent up on the petition of Laurence McDermott, the publisher and printer of the *Colonist* paper, who had

been condemned to six months imprisonment by the Supreme Court of Civil Justice of the Colony for a contempt. I do not cite this case to show positively that the Lords of the Privy Council have decided that there is a right to appeal in cases of contempt, because they have granted the order without prejudice to the competency of the appeal; but I bring it forward to show that the Privy Council has not laid down the doctrine that is about to be laid down in this case; but on the contrary, in so far as it has judged, it has leaned to a contrary opinion. But what can be the inconvenience of a party condemned coming before the five judges here, instead of being satisfied with the decision of one who may be his enemy, perhaps his political enemy, and asking them to decide whether the condemnation of the one is legal? Are we to answer him and say, not only we shall decide against you, but we won't even hear you? Is he to have no remedy but an impeachment? To say that there is no remedy in this constitutional country seems to me very strange indeed. Besides an impeachment is not a remedy for the injured party. It can only end in the censure or dismissal of the judge. How strangely does this case contrast with one which occurred here some short time ago.* An enormous crime was committed, a crime that might involve the country in war. In that case the Court of Queen's Bench, as in Mr. Ramsay's case, the Court of Queen's Bench—for I will not commit the folly of calling it the judgment of Mr. Justice Drummond—gave an order as to the custody of the prisoners, and yet on *habeas corpus* a judge in Chambers declared that the order of the Court of Queen's Bench was null and void. If this could be done on *habeas corpus*, why not on Writ of Error? If the arbitrary doctrine is to prevail that there is no mode of reviewing a judgment for contempt, what becomes of the right of free discussion, and the liberty of the press? We shall be in the same condition they are in France, for any Judge may say—"Mr. Editor, you shall not write this or that." For myself I want no such privilege; not only as a citizen but as judge I invite the scrutiny of the public

eye. If I am honest, I have nothing to fear; and if I am dishonest, the sooner I am found out the better. Apart from the rule laid down in our statute, and which, as I have shown clearly, gives the Writ, I shall show that the same doctrine is laid down by Blackstone.

"A judgment may be reversed by writ of error: which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper addition to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the Court, or not duly describing where his county court was held; for laying an offence, committed in the time of the late king, to be done against the peace of the present; and for many other similar causes."

Blackstone, like our statute, does not particularise, but it was not necessary for him to do so. It is mathematically included; the whole contains its part, and it is not for me to cut off a segment of the circle, and to say that the whole circle is to be considered less the segment. Mr. Ramsay may have been right or he may have been wrong, but with that I have nothing to do at present. He has at all events done his best to have the judgment reviewed, and he is met by the answer, you have no remedy. In the case of Barsalou, I refused a rule for contempt, for I trembled at the idea of putting an arbitrary restriction on discussion; and if a libel had been published, there was another course—by indictment. I must express my formal dissent from the judgment about to be rendered.

AYLWIN, J. No reported or adjudged case can be found to support the writ issued in this case. It is the first time the Attorney General has consented to the issuing of such writ, and I am of opinion that it issued illegally and must be quashed.

BADGLEY, J. The learned Judge Mondelet

* His honor refers to *Ex parte Blossom*, 1 L. C. Law Journal, 88.

has not confined his attention to the sole technical point submitted for the decision of the Court, but, in the expression of his opinion upon the circumstances and law of the case, has taken the opportunity of enlarging upon the constituents of contempts in general, their relation to society as now constituted, and the law which he considers applicable to them. I cannot coincide in his opinions, and will not diverge from the question before the Court, which is confined within the comprehensive question put to the plaintiff in error by the Chief Justice—have you a Writ of Error in a case of this sort? or, in other words—does a Writ of Error lie in this case? It becomes, therefore, essential to ascertain what the case is, and the limit of the particular controversy, which can only be supplied by the record itself, and it must be examined for that purpose, because the Court cannot be influenced by facts or suggestions beyond it. The completeness of the record is assumed because no suggestion of diminution or falsification has been made. A brief statement of the proceedings of record leading up to the judgment complained of, may be made, only however as explanatory of the subject, but without in any way adjudging upon the facts or incidents themselves upon which that judgment was founded.

In the last criminal term of the Court of Queen's Bench for this district, presided over by a Judge of this Court, the Hon. Judge Drummond, a rule for attachment was issued by the Court against the plaintiff in Error, a member of this bar, and then conducting the Crown business before that Court, for a contempt alleged to have been previously committed by him in the publication under his name, in two numbers of the *Montreal Gazette*, both filed of record, of libellous, insulting and contemptuous statements and language, concerning a Judge of the Court of Queen's Bench, in reference to his judicial conduct in a certain judicial matter before him, in those statements mentioned, and which it was alleged tended to prejudice the administration of justice, &c., &c. The plaintiff in Error appeared to the rule, and after the rejection of his recantation against the presiding Judge, interrogatories were exhibited against him tending

to identify him as the author and writer of those statements, but were not responded to, but the plaintiff in Error produced and filed of record, an answer in writing to the rule for attachment, in which he set out a variety of objections in fact as well as law, against the proceeding, the relevancy or pertinency of which objections, it is not at present necessary to inquire into, but declaring that whilst he did not admit his authorship of these statements, he at the same time declared that he did not deny his authorship of them, and after reiterating in his answer certain injurious expressions against the honorable judge with reference to the original proceedings, out of which this affair arose, the plaintiff in error concluded by asserting his right to make those offensive statements.

After having filed his elaborate answer, he moved to quash the rule upon grounds set out in his motion, which having been rejected by the Court, he subsequently produced and filed of record his declaration in writing, affirming that as the honorable judge had expressed his absence of intention to impute personal misconduct to him in the original matter, he (the plaintiff in error) withdrew his injurious and insulting statements against the honorable judge. This declaration was filed on the 2nd of November, and was succeeded on the following day by the judgment complained of, in which the Court declared the plaintiff in error guilty of contempt, and fined him to the amount of \$40, and to remain committed until paid. It is manifest that the proceedings referred to above were in a matter of alleged contempt, that the judgment was rendered upon such contempt, and by a Court of competent jurisdiction entitled to cognizance of such a matter. It may be added that the proceedings were before a Court of Record, acting not according to the common law by a jury, but in a summary manner, according to the common law by attachment.

Upon the particular point submitted to the Court, it is plain that the merits of the contempt do not fall within the province of this Court to express any opinion upon, or whether the publications referred to were libellous or not, or the language contained in them commendable or respectful: at present, our duty

is to determine whether this Writ of Error can lie to examine and consider this conviction of contempt.

Before proceeding to examine the main question, it is right to observe, with reference to some part of the procedure in this case, but only as a matter of professional practice, that when contempt is of such a nature that if the fact which constitutes it be once acknowledged, and the Court cannot receive any further information by interrogatories, there is no necessity for administering them, if the defendant wish to be admitted to make such acknowledgment. Again, when the evidence of a contempt of Court is before the Court and the offence is palpable, a rule to show cause why an attachment should not be issued is unnecessary. In such cases attachments may be issued in the first instance. The practice of taking a rule arose out of a distinction between direct and consequential contempts, and was resorted to when it became necessary to procure evidence not before the Court.

It has also been held that the use of abusive and impudent language towards a Court or any of the Judges thereof, and contained in a petition for a rehearing, signed by the party in proper person and filed with the clerk, is a contempt, and this though he is a licensed attorney.

And it has likewise been held upon the subject of the withdrawal of the offensive statements, that when a writing is so clear of itself as to amount to a libel, the mere affidavit of the defendant that he had no intention of offering any contempt to the Court or Judge will not screen him from punishment. And so Holt on Libel, p. 22, Am. Ed., in which it is said that the Court did not consider the disavowal of the slanderer, as exculpatory; on the contrary, it was declared that the disavowal of any bad intent will not do away with the pernicious tendency or effect of publications reflecting on judicial proceedings, &c., &c.

Leaving these matters of procedure, it would seem to be quite unnecessary to enlarge upon the power admittedly vested in Courts of Justice to commit for contempts, a power which has never been disputed or questioned as being inherent in them under the common law of England; the books are replete with cases of that

description, and judgments for contempt are very frequent. Hawkins, in his Pleas of the Crown, says "that for contemptuous words or writings concerning the Court, the party is punished by attachment for contempt;" and he adds, with reference to this last class of cases, "it seems needless to put instances of the kind, so generally obvious to common understandings." Lord Chief Justice Parker says, in reference to libel publications in a newspaper in the form of an advertisement reflecting on the proceedings of justice, that it is "a reproach to the justice of the nation, a thing insufferable and a contempt of Court." Blackstone says that some of the contempts may arise in the face of the Court, others in the absence of the party from it, *inter alia* mentioned by him, "by speaking or writing contemptuously of the Court, or Judges acting in their judicial capacity, &c., and by anything, in short, that demonstrates a gross want of that regard and respect which when once Courts of Justice are deprived of their authority, so necessary for the good order of the State, is entirely lost among the people." Mr. Justice Wilmot, in his very learned and elaborate opinion upon the writ of *habeas corpus*, holds the same view, and maintains "that this power is as ancient as the common law, and the attachment a constitutional remedy." The Courts in the United States, resting upon the common law of England, entertain similar opinions, which will be found set out with great perspicacity in the 2nd vol. of Bishop upon Criminal Law, in which he has given cases and law as to the various kinds of contempt, viz: those committed in the presence of the Court, and those committed out of its presence, under which last head the author cites a case, which will be mentioned here, as somewhat analogous with the one in hand, with the difference that in the American case the language was verbal. The case occurred in Virginia, where one being interested in the event of a pending suit, but not as a party, met the judge proceeding to take his seat on the bench, and on being spoken to by him, responded in substance, "I do not speak to any one who acted so corruptly and cowardly as to attack my character when I was absent and defenceless"—alluding to expressions of

the judge on the trial of the cause at a former term. This was held to be a contempt.

Assuming then the existence of this inherent power in Courts of justice to punish for contempt, is their judgment liable to be controlled by any other Court or Tribunal? As introductory to the answer to this question, it must be observed that in the organisation of the Provincial Judicature, the Court of Queen's Bench has been established by statute as the highest judicial tribunal in Lower Canada, but divided into two jurisdictions separate and distinct the one from the other, the one being constituted on the Civil side a Court of Appeal and error in civil suits, and the other on the Criminal side, being constituted an original Criminal Court for the trial of criminal offences, and also a Court of Criminal Error. As to the Civil side, the Legislature has provided for the disqualification of a judge from sitting in Appeal or Error, if he has sat on the case appealed from at the rendering of the final judgment, but has not extended this disqualification to judges, sitting on the Criminal side upon Criminal Appeal or Criminal Error, who sat in the original Criminal Court. The Court, therefore, as at present personally constituted, is according to the statute, and the proposed recusal by the plaintiff in Error against the judge who judged the contempt has been legally rejected.

It must also be inquired, what is the nature of the judgment or conviction for contempt? It may be briefly answered that it is judgment in execution, and wherein bail may not be taken. This fact, that is, the negation of bail, indicates as well the stringent nature of the judgment in itself as its immediate enforcement upon the party convicted by it. It was held in *Brass Crosby's case*, 3 Wils. 188, that the adjudication for contempt is a conviction, and the commitment in consequence is execution, and no Court can discharge on bail a person that is in execution by the judgment of any other Court. This doctrine, which has not since been interfered with in England, has also been sustained in the United States, and so held almost in the same words by Story, J., in the case of *Kearney* in the Supreme Court, 7 Wheat. 43, following *Crosby's case*, and likewise maintained in many other report-

ed cases. Arguing from the mere reason of the thing, it is a plain consequence, that contempts would necessarily fail of their effect, and the authority of Courts of Justice would become contemptible, if their judgments could in such matters be subjected to revision by any other Tribunal.

It has been very strongly urged that this power itself from its very nature must necessarily be independent of all other tribunals: for if it depends upon another whether a punishment can be inflicted or not, that very dependence defeats and overturns it. The insulted judge must go to law before some other tribunal with every one whom his decision offends, and leaving his own duties in his own Court, must attend upon other Courts and before other judges who may not be disposed to discourage the contempt, and it might happen set aside and quash the proceedings, and arrest or reverse the judgment, and, therefore requiring the renewal of the proceedings to encounter similar difficulties.

Under such a state of law, no one would be afraid to offend; the delay of punishment and the manner and chances of escaping it, would disarm the expected punishment of all its terrors, nor could the insulted Court or Judge ever think of the attempt to cause the infliction of punishment under so many discouragements. It would be idle for the law to have the right to act, if there be a power above it which has a right to resist. In Criminal matters penal law must enforce satisfaction for the present acts and security for the future; in other words it *must have* a remedy and a penalty. How could there be either a remedy or a penalty, if the judgment of contempt was subject to review by any other tribunal?

Apart from this most conclusive reasoning, no reported cases can be found in which other tribunals have interfered with such convictions of other Courts, whilst on the other hand numerous direct authorities are to be found the other way. *Brass Crosby's case* has already been adverted to, which settled that point many years ago in England, and American authorities are at one with the English decisions. Mr. Justice Blackstone says, "the sole adjudication of contempt and the punishment thereof belongs exclusively and without inter-

fering to each respective Court. Infinite confusion and disorder would follow if Courts could examine and determine the contempt of others." I shall also refer to Hurd on Habeas Corpus at page 412, where he lays it down that the right of punishing for contempt is inherent in all Courts of Justice and essential to their protection and existence. A commitment under such conviction is a commitment in execution, and the judgment of conviction is not subject to review in any other Court unless specially authorized by statute." And in *Morrison v. McDonald*, 8 Shep. 550, it was held "that there can be no revision, either by appeal or certiorari, of the judgment of a Court of record for imposing a punishment for a contempt of the Court."

It has been urged that this Court as now formed on the criminal side, having been constituted a Court of Error for criminal matters, has jurisdiction in this case, and is bound to sustain the writ of error here issued. It is quite true that this Court on the criminal side has jurisdiction over all crimes and criminal matters to the extent contemplated by the criminal laws of England introduced and established here by the Imperial Act of 1774, and as since amended by our Provincial legislation. It has also more recently been constituted by statute a Court of Error in all criminal cases before the said Court, on the Crown side thereof, or before any Court of Oyer and Terminer, or Court of Quarter Sessions, and still more recently, it has been authorized to consider and decide reserved questions of law arising in criminal trials, in which any person has been convicted at any criminal term of the said above mentioned Courts, but apart from these later statutory powers, this Court of Queen's Bench has no appellate criminal jurisdiction. By law the Court of Queen's Bench in term, in the exercise of its original criminal jurisdiction, is an independent Court, not subject to the control of this Court sitting in error, except in such cases as are specially within its cognizance by statute or in the exercise of its admitted powers, and hence this Court cannot under the common law of England, from which it derives its chief criminal powers, be made to affirm the legal existence of writs of error in convictions for contempts,

simply because no authorities can be found to say that in cases of contempt there is no writ of error. This negative argument is of no force. The legal existence of such a writ requires to be derived from affirmative authorities: but of these there are none, and this Court cannot without such authority of itself initiate such a proceeding.

Archbold, however, tells us, that no writ of error lies upon a summary conviction, and that it only lies on judgments in Courts of Record acting according to the course of the common law. Now, Blackstone lays it down that the proceeding in contempt is in all cases summary before the judge without the intervention of a jury; and it was held long ago in England, and that ruling has since existed in its integrity, "that it was against the nature of a writ of error to lie on any judgment, but in causes where issue might be joined and tried, or where judgment might be had upon demurrer." This was the case of the *King v. Dean and Chapter of Trinity Chapel, Dublin*, 8 Mod. 27, and upon writ of error brought into the House of Lords, all the judges of England being of opinion that the decision was correct, the judgment of the King's Bench was affirmed, 2 Bro. p. c. 554. And Kent upon this doctrine says, "the principle is of immemorial standing: it has stood the test of two centuries as an incontrovertible principle without a precedent or doctrine to oppose it. To overthrow it would be to tear up the common law by the roots." It is therefore fair reason as well as law to hold against the writ of error lying in this case.*

Warranty on sale of horse.—On the sale of a horse the seller signed the following warranty:—"June 5, 1865. Mr. C. bought of Mr. G. G. a bay horse for £90, warranted sound.—G. G. Warranted sound for one month. G. G."—*Held*, that the latter words limited the duration of the warranty, and meant that the warranty was to continue in force for one month only; and that complaint of unsoundness must therefore be made by the purchaser within one month of the sale, *Chapman v. Gwyther*, Law Rep. 1 Q. B. 463.

* To be concluded in the next number.

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No. 11.

CONTEMPT OF COURT—THE McDERMOTT CASE.

We intimated our intention last month to revert to the case of McDERMOTT, noticed in the judgment of the Court of Queen's Bench in Mr. RAMSAY's case. The report first communicated to us, and printed at page 146, was that published in the *Times* newspaper, but we have since received that contained in "The Law Reports," which gives the facts and judgment at much greater length.

The first circumstance worthy of note is that when McDERMOTT made his application to the Privy Council on the 3rd November last, the term of six months, during which he was to be imprisoned, had actually expired on the 13th October previous. LAURENCE McDERMOTT was the publisher of the *Colonist* newspaper, in British Guiana, and the alleged contempt of Court consisted in publishing in that newspaper two articles supposed to reflect on JAMES CROSBY, Esq., one of the Judges of the Supreme Court in that Colony, and on Mr. ROSS, a barrister practising in that Court. The petition for leave to appeal stated that great dissatisfaction had existed respecting the judicial proceedings of the Supreme Court, and especially with regard to certain proceedings taken against Mr. CAMPBELL, one of the officers of that Court, who, by reason thereof, had been compelled to resign his office; that the petitioner, in reporting the particulars of such proceedings, allowed them to be commented on, and their nature and legality to be discussed in two articles in the *Colonist* newspaper. That the petitioner had an intimation that an *ex parte* order, dated the 2nd April, 1866, had been issued by the Supreme Court against him, in the following form:—"Upon the information and motion of Edward Charles Ross, Esq., Barrister-at-Law, this day made to me in non-session of this Court, and upon reading the affidavit of James Burford, dated and sworn this day, and filed in this matter; and upon reading a cer-

tain copy referred to in such affidavit of a printed newspaper called the *Colonist*, appearing to have been published by one Laurence McDermott, at his office, Lot 26, Water Street, New Town, on the 29th day of March last, wherein are printed and published divers scandalous and libellous articles and statements reflecting on the administration of justice in this Colony by the Supreme Court thereof; and in particular certain scandalous and libellous passages and statements as to his honour James Crosby, Esq., one of the judges of the said Supreme Court, maliciously abusing and threatening the said judge, and tending to the great obstruction of the course of justice, and being in contempt of this Court, I do hereby order and direct that the said Laurence McDermott do personally attend this Court at its sitting, in George Town, on Wednesday next, the 4th day of April instant, at half-past ten A. M., and further that he then and there show cause why an attachment should not be issued against him for such contempt as aforesaid, or why he be not committed to prison or otherwise dealt with in respect of such contempt according to law, and as the Court shall think fit to order. J. Beaumont, C. J."

The petition further stated that this order was not personally served on the petitioner, but was left at the registered office of the *Colonist*, and was handed to the petitioner by one of his servants; and the petitioner, having such notice, and the same purporting to affect his personal liberty, he appeared in Court on the 4th of April, 1866. That the Court, consisting of Chief Justice BEAUMONT, and Mr. Justice BEEBE, thereupon adjourned the matter of the order to the 6th April, when the petitioner again appeared, and his Counsel were heard on his behalf. The Court then took notice of another article which had appeared in the *Colonist* on the 5th April, reflecting upon the proceedings of the Court, and the petitioner was ordered to appear again on the 10th April, to answer as well for the former contempt as that of the 5th April. On the 10th April, the petitioner again attended personally, and being called on to show cause, as directed by the order of 6th April, his counsel objected to do so, alleging that the order was

irregular, and ought not to be proceeded on; but that the Court ought, without reference thereto, to adjudicate on and dispose of the matters alleged against the petitioner, and as to which he was called on to show cause by the orders of the 2nd and 4th of April. The Court overruled this objection, and held that the order of the 6th April was regular. And further (as his counsel objected that the order was pronounced *ore tenus*, and that no minute or written copy thereof had been served on him), the Court considered that the petitioner having been present personally and by his counsel in Court, when such order was made, it was not necessary to serve him with any minute or copy thereof. The petitioner refused to show cause, and the informant having been heard, the Court reserved its decision till the 13th of April, when it gave judgment, adjudging that McDermott had committed a high contempt of the Court by printing and publishing the articles of the 29th March and 6th April, and ordering that he be imprisoned for six months. The petitioner was delivered into custody the same day under a warrant of commitment made by Chief Justice BEAUMONT.

Being advised that the order of commitment was illegal, he applied to the Court before he was taken into custody, and afterwards by petition, for leave to appeal from the order of commitment to Her Majesty in Council. In his petition for leave to appeal he stated that the order had the effect of a final or definite sentence, involving a civil right, namely, his right to liberty for six months, which was of more value to him than the sum of £500, the sum limited by the Order in Council regulating appeals from the Supreme Court to Her Majesty in Council. By the aforesaid Order in Council it is provided, that if the party appellant shall establish to the satisfaction of the Court that real and substantial justice requires that, pending such appeal, execution should be stayed, it shall be lawful for such Court to order the execution of any judgment to be suspended pending such appeal, if the appellant shall give security for the immediate performance of any judgment which may be pronounced by Her Majesty in Council upon any such appeal; and the petitioner submitted that real and substantial justice required

that, pending such appeal, execution should be stayed, inasmuch as the petitioner had been condemned to be imprisoned for six months; and unless the execution of the sentence was stayed pending the appeal, the petitioner, in the event of the appeal being decided in his favour, would in all probability, before the decision could be made known in the colony, have undergone the whole period of such imprisonment, and be without remedy or redress for having suffered the same. On the 4th May, 1866, Chief Justice BEAUMONT refused to grant the petitioner leave to appeal, on the ground that it was not an appealable case within the provisions of the before mentioned Order in Council of the colony.

The petitioner then petitioned Her Majesty, praying for inquiry and relief in the matter of his imprisonment, and was advised by the Lieutenant Governor of the colony and the Secretary of State for the colonies, that the only redress he could obtain was by an appeal to be heard by the Judicial Committee. The petitioner accordingly moved for leave to appeal from the order of the 13th April, 1866, and the judgment of the Supreme Court of the 4th May, 1866, refusing him leave to appeal. The following is the report of the argument and judgment given in the Law Reports (1 P. C. 266—8).

"Mr. Coleridge, Q. C., for the petitioner, said: Although the appealable value is limited by the Order in Council of the 20th June, 1831, to £500, yet we submit that, in a case such as this, where the liberty of the subject is involved, an appeal will lie irrespective of any money value. If the rule were otherwise, the grossest injustice on the liberties of British subjects resident in the colonies, might be perpetrated at the caprice of the judges in the colonies. It is essential, therefore, that such an appeal should be allowed. It has been admitted in several cases: *Smith v. The Justices of Sierra Leone* (3 Moore's P. C. Cases, 361); *Rainy v. The Justices of Sierra Leone* (8 *ibid.* 47). In this country the petitioner would have had his remedy by writ of *Habeas Corpus*, but in a case like this, that writ could not be obtained from a Colonial Court, and since the statute, 25 and 26 Vict. c. 20, s. 1, it cannot be applied for here. [LORD WESTBURY:

Suppose a contempt at *Nisi prius* and a fine inflicted, would an appeal lie? Perhaps not in England, but in the colonies it is different; thus in *Rainy v. The Justices of Sierra Leone*, an appeal from an order imposing fines and imprisonment on a practitioner of the Court was allowed; and though that case broadly lays it down that, in the case of contempt, the Court making the order is the sole judge of what constitutes the contempt, the appeal was admitted by this Court on the ground of the illegality of the order, and the alleged contempt was inquired into.

"**LORD WESTBURY** : Their Lordships regard this case as one of great importance, and one that may lead to important consequences. On the one hand it is essential to preserve a Court from all obstruction to the course of justice; on the other hand, it is very desirable that there should be a check upon any arbitrary exercise of the powers of the Court. But at present, having regard to the distinction between things done by practitioners of Colonial Courts, and things done *in curia*; things done directly leading to interference with the administration of justice, and things which do not come within either of these categories, their Lordships are disposed to give leave to appeal, but without prejudice to the question, whether there is a right of appeal or not. Our object is that of necessity this important question should be fully argued when it comes before us."

By an Order in Council, made on the petition, it was ordered that the petitioner should be allowed to enter and prosecute his appeal from the order of the Supreme Court of the 13th April, and the judgment of the 4th May, 1866, without prejudice to the competency of Her Majesty in Council to entertain an appeal from an order of a Court of Record, inflicting punishment, by fine or imprisonment, for a contempt of Court, which question was to be open to argument on the hearing of the appeal, and a copy of the order was directed to be served on the Judges of the Supreme Court, with leave to put in their answer to the appeal.

It is apparent from the report that in this case the judge assailed (CROSSY) took no part whatever in the proceedings against McDermott. Though a judge of the Supreme Court,

he appears to have been absent on every occasion when the case was before the Court. This may have been merely accidental, or, more probably, in consequence of the natural reluctance of a judge to take part in an inquiry, in the course of which he may be exposed to fresh insult. At all events, no allusion to the circumstance occurs in the report, and there is no ground for supposing that Mr. Justice CROSSY deemed himself incompetent. We have as yet received no account of further steps before the Privy Council. Possibly McDermott, having undergone the full term of imprisonment, may shrink from the expense of prosecuting an appeal, which can give him no substantial redress.

ACTION QUI TAM.

M. LE REDACTEUR.—Le gouvernement vient de refuser d'obéir à une loi passée en 1864, sous les circonstances suivantes :

La clause 3 du ch : 43, de la 27-28 Vict., dit : " Il sera loisible à la couronne d'intervenir aux dites actions ou poursuites dans le Bas Canada en tout état de cause, et d'en prendre seule la conduite; pourvu que s'il appert, après la fin d'icelles, qu'il y a une raison suffisante pour intenter la poursuite, et si le dit poursuivant a fourni à la couronne, qui sera ainsi intervenue, toute l'aide et les renseignements en son pouvoir, pour faire triompher l'action, la couronne rembourse au poursuivant ses frais de poursuite."

Pour ne compromettre aucune des parties intéressées, nous nous abstenons de les nommer. A. avait souffert des dommages du défaut d'enregistrement de la déclaration de société existant entre B. et C. Il se crut justifiable d'intenter une action *qui tam*, conformément à la loi, contre B. et C. pour le recouvrement de la pénalité, tant en son nom qu'au nom de Sa Majesté. Mais au moment de prendre le bref, il s'aperçoit que B. et C. se sont fait poursuivre par un homme de paille, et il apprend en même temps que l'avocat de cet homme de paille n'est qu'un prête nom, qui sert à déguiser l'intervention des avocats de B. et C. Sous ces circonstances, A se crut justifiable d'informer la couronne de cette tentative de fraude contre ses intérêts, n'agissant en cela qu'en conformité à la loi.

Le 2 mars dernier, A écrit au procureur général et le prie de se prévaloir des dispositions de la loi ci-dessus citée et d'intervenir dans les actions *qui tam*, tout en l'informant de tous les faits qui pouvaient faire ressortir la fraude concertée entre B. et C.

Voici l'étrange réponse du Gouvernement :—

"BUREAU DU PROCUREUR GENERAL, B. C.

"Ottawa, le 15 Mars, 1867.

"MONSIEUR,

"J'ai reçu instruction de l'Honorable Sir N. F. Belleau, de vous informer, en réponse à votre lettre en date du 2 de mars courant, que les tribunaux judiciaires se trouvant saisis des causes auxquelles vous faites allusion, la justice doit avoir son cours,—et que l'intervention du Procureur-Général dans ce cas ne serait pas justifiable.

Je vous renvoie l'affidavit qui accompagnait votre lettre.

J'ai l'honneur d'être,

Monsieur,

Votre très obéissant serviteur,

(Signé) GEO. FUTVOYE."

A ne pouvait laisser sans réplique une semblable réponse.

"Montréal, 28 mars, 1867.

HON. PROCUREUR-GENERAL, B. C.

Ottawa.

MONSIEUR.—Je n'ai pu répondre avant ce jour à la lettre que j'ai reçue du Bureau du Procureur-Général, B.C., en date du 15 courant, par laquelle vous me dites que les tribunaux, se trouvant saisis des causes auxquelles je faisais allusion, la justice devait avoir son cours,—et que l'intervention du Procureur-Général dans ce cas ne serait pas justifiable.

Je vois que je n'ai pas été compris, et j'espère que vous prendrez en considération les remarques qui suivent :

Deux associés sont passibles chacun d'une pénalité de deux cents piastres, pour ne pas avoir fait enregistrer leur déclaration de société dans le temps voulu par la loi, et moitié de l'amende appartient au poursuivant, et moitié à la Couronne. Ces associés, se voyant près d'être poursuivis par moi, qui ai eu à souffrir de ce défaut d'enregistrement, se poursuivent eux-

mêmes sous un nom supposé, et le même avocat conduit la procédure, tant pour la demande que pour la défense, toujours sous différents noms, afin de frauder la loi et la Couronne.

En vertu du ch. 43, 27 et 28 Vict., la Couronne a le droit d'intervenir dans toutes les actions *qui tam*, et en tout état de cause (section 3), dans le but de voir à ce que ces poursuites, quand elles sont intentées, soient sérieusement conduites, et empêcher qu'elles aient lieu dans le but de défaire les fins de la loi. Si la justice n'eut pas été saisie, l'intervention de la Couronne n'était pas nécessaire, et le soussigné se serait chargé lui-même de faire une poursuite sérieuse, et dont la Couronne eût profité. C'est précisément parce que la justice est saisie, que l'intervention de la Couronne est nécessaire,—c'est parce qu'elle est saisie dans un but frauduleux, et pour empêcher qu'un poursuivant sérieux en ait saisi la justice, que le soussigné a pris la liberté d'informer le Procureur-Général, que le cas prévu par la loi suscitée se présentait.

Sous ces circonstances, je ne doute pas que vous en veniez à la conclusion que votre devoir est d'intervenir, lorsqu'une personne de bonne foi informe la Couronne qu'on veut la frauder et éluder la loi.

J'ai l'honneur, &c.,

A.

Voici maintenant la conclusion à laquelle le Gouvernement en est venu :

"BUREAU DU PROCUREUR-GENERAL, B. C.

Ottawa, le 8 avril, 1867.

"MONSIEUR,—J'ai reçu instruction de l'Honorable Sir N. F. Belleau, d'accuser réception de votre lettre en date du 29 de mars dernier, et de vous mander que ma lettre du 15 de mars aussi dernier, est la seule réponse qu'il se croit justifiable de donner dans cette affaire.

"J'ai l'honneur, &c.,

"(Signé,) GEO. FUTVOYE."

De tout cela il résulte que le Gouvernement considère comme lettre morte la loi de 1864, qui a été faite dans un but de protection. Mais ce qu'il y a d'étrange dans la correspondance ministérielle, c'est l'absence de logique : "c'est parce que les tribunaux sont saisis, que nous n'intervenons pas." Est-ce que vous auriez pu

intervenir si les tribunaux n'avaient pas été saisis? On veut que la justice ait son cours, et pourtant on la laisse aux prises avec des gens décidés à la détourner de son cours régulier, c'est-à-dire, décidés à éluder la loi et à frauder la Couronne.

Si c'est ainsi que le Gouvernement entend l'exécution des lois, il nous semble que nous pourrions avoir des sessions moins longues et des statuts moins considérables.

GONZALVE DOUTRE.

13 avril.

BANKRUPTCY—ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Abbott, Richard	London	Thos. Churcher	London	April 3rd.
Amos, John	London	L. Lawrason	London	March 30th.
Anderson, John	Holm, C. W.	Thomas Saunders	Guelph	April 5th.
Arcand, Alphonse, individually and as partner of Arcand & Frère	Lambton, C. E.	T. Sauvageau	Montreal	April 1st.
Atkinson, Wm. Thos.	Whitby	James Holden	Whitby	April 2nd.
Baker, Wm. S.	Frelighsburg	Wm. M. Pattison	Frelighsburg	April 8th.
Barron, Geo. R.	Owen Sound	George J. Gale	Owen Sound	April 4th.
Bell, James	Pembroke	Thos. Deacon	Pembroke	March 30th.
Bletcher, Wm.	Port Hope	E. A. Macnachtan	Cobourg	April 9th.
Bradbury, Jas. Roberts	Toronto	Thomas Clarkson	Toronto	April 13th.
Branchaud & Frère	Ste. Cécile, C. E.	T. Sauvageau	Montreal	April 5th.
Burbank, Jas. E. and Geo. H. Goddar, individually and as partners of Burbank & Goddar	Richmond, C. E.	A. M. Smith	Sherbrooke	April 5th.
Carey, Daniel	Quebec	A. Fraser	Quebec	April 12th.
Currin, Joseph	Township of Gloucester	Francis Clemow	Ottawa	April 2nd.
Daigle, Pierre, Odile Hebert and Hector Duvert, individually and as firm of Daigle, Hebert & Duvert	Montreal and St. Charles	T. Sauvageau	Montreal	March 28th.
Delaney, James	Kingston	Henry C. Voigt	Kingston	April 10th.
Delaney, Peter	Kingston	Henry C. Voigt	Kingston	April 10th.
Denison, R. B.	Toronto	W. T. Mason	Toronto	April 6th.
Fletcher, Edwin	Oil Springs	George Stevenson	Sarnia	April 16th.
Franks, William	Lucan	Thos. Churcher	London	April 11th.
Gale, Benjamin	Northridge	J. McCrae	Windsor	March 29th.
Gemmill, Wm., individually and as copartner of Gemmill, McDougall & Co.	Montreal	A. B. Stewart	Montreal	April 1st.
Girard, Barthélemy	St. Pie, C. E.	T. S. Brown	Montreal	April 9th.
Harper, John	Toronto	Thomas Clarkson	Toronto	April 12th.
Hill, John & Wm.	Township Logan	Thos. Miller	Stratford	April 3rd.
Kennedy, Adam	Pembroke	Thos. Deacon	Pembroke	April 16th.
McDonald, A. & Sons	Montreal	John Whyte	Montreal	April 10th.
McKinn, Christopher S.	Napanee	W. S. Williams	Napanee	April 13th.
McNeely, John B.	Sarnia	George Stevenson	Sarnia	March 18th.
Maddocks, Thos. B. H.	Stratford	Thos. Miller	Stratford	April 3rd.
Provandie, Charles A.	Sherbrooke	A. M. Smith	Sherbrooke	April 13th.
Ranney, Geo. Worner	Belleville	Geo. D. Dickson	Belleville	March 29th.
Ross, John	Clinton	S. Pollock	Goderich	March 28th.
St. George, J. Bte.	St. David, C. E.	T. Sauvageau	Montreal	March 28th.
Ste. Marie & McDonell, and McDonell & Ste. Marie	Knowlton and Waterloo	T. Sauvageau	Montreal	April 10th.
Smallcombe, Roger	Stratford	Thos. Miller	Stratford	April 3rd.
Smith, Robert Cattle	Toronto	Thomas Clarkson	Toronto	April 5th.
Stanton, Nicholas	Kingston	R. M. Rose	Kingston	April 5th.
Taggart, John	London	Thos. Churcher	London	April 15th.
Tait, Wm. Campbell	Ulverton, C. E.	John Whyte	Montreal	April 2nd.
Traber, Wm. J., and Alfred Suhler	London	Thos. Churcher	London	March 28th.
Tredley, Henry	Township of Howick	S. Pollock	Goderich	March 26th.
Walsh, James	St. Davids	W. A. Harvey	St. Davids	April 15th.
Wartman, Barnabas	Township of Kingston	R. M. Rose	Kingston	April 2nd.
Watson, David	Culloden	Jas McWhirter	Woodstock	April 8th.
Watson, James	Goderich	John Kerr	Toronto	April 10th.
Whitcomb, Martin C.	Napanee	W. S. Robinson	Napanee	April 6th.
Wood, Alonzo	Shefford	A. B. Foster	Waterloo	April 19th.
Woodward, Francis, and Edwin D. Broughton	Petrolia	George Stevenson	Sarnia	April 13th.

N. B.—The Writs of Attachment are not given separately. The names of the insolvents against whom attachments issue will appear in the table of assignments when assignees are appointed.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

RAMSAY v. THE QUEEN.

(Continued from page 240.)

BADGLEY, J. (Conclusion.) Reference has been made to the recent McDermott case before the Privy Council, in which Mr. McDermott, the editor of a newspaper in Demarara, had been subjected to six months' imprisonment on a conviction in contempt for publishing in his newspaper what the judgment of conviction affirmed to be scandalous, reflecting upon the Court and the administration of justice. That case has no application to this particular, and even McDermott's counsel before the Judicial Committee of the Privy Council calls it a case of peculiarity, and as such entreats the Court to permit the issue of the appeal. And the judges of the Privy Council appear to have so taken it, inasmuch as they abstain from any opinion upon the matter of the application, and content themselves with saying that they would give leave to appeal, but would reserve to themselves the right to consider *whether the appeal was allowable*. Under all these circumstances I am of opinion to quash the writ.

DUVAL, C. J. The law of discretion is the law of tyrants, and a judge who relies on that law, is a tyrant on the Bench. On the other hand, if a judge respects the law of the land, his decisions will be respected. Otherwise a judge might indulge term after term in improving on the criminal law of England. One day he might say that there was no capital punishment, and another, that there was a writ of error in cases of contempt, although there has not been a single case cited. We are to be guided by the criminal law of England, and not by individual judicial notions of public convenience. Our own statute has made no change. What is the criminal law of England as stated on this subject? That every Court must be the judge of its own contempts. Blackstone already referred to, in treating of contempts, says that the judgment of the Court is to be carried into immediate execution. And if so, how can there

be a writ of error? A man, for instance, is sent for twenty-four hours to jail. He suffers the punishment before he can get his writ of error. There is not a single case in the English books that can be referred to in support of such a pretension. In the case of McDermott, communicated to the *Lower Canada Law Journal*, (*Vide ante*, p. 146), we are told that different rules were laid down. On the contrary, Lord Westbury distinctly said the Committee would reserve to themselves the right to consider whether the appeal was allowable. We cannot find any authority which would justify us in interfering in this case. We are told that if in England there is no writ of error, there is one by our own criminal law. On what is that founded? Most assuredly the intention of our legislature was not to introduce anything new in this respect. Our statute says there may be a writ in all criminal cases. Let us see if we have nothing similar in England which will give us the interpretation of this. Has not the English Court of Queen's Bench jurisdiction in all criminal cases? Do not the English statutes and common law give the Court of Queen's Bench the right to take cognizance of all criminal cases? Then why should contempt be embraced here any more than in England? There is nothing in the statute to show that it was the intention of the Legislature to go beyond the English law, and we are therefore bound by the English decisions. It was said, you could get your remedy by *Habeas Corpus*, and why not by a writ of error? But the two things are as distinct as can be, and it does not at all follow that because a judgment can be reviewed on a writ of *Habeas Corpus* that it can also by a writ of error. It was idle to put such a question. We follow precisely the rule laid down in England, and whatever the Privy Council may do hereafter in the McDermott case, it cannot affect the grounds of our judgment. The Privy Council has powers over all Courts of the empire which we cannot pretend to exercise. It is very consolatory, however, for us to know that if we are wrong our refusal does not debar the party from going before the Privy Council. For my part I solicit an appeal. I wish the question to be decided; but having looked at the case dispassionately, I

can come to no other opinion, and I have not heard one principle of law laid down to-day militating against the judgment of the Court. I do not argue from considerations of convenience, but from principles of law; and if we are wrong, we can be set right by an appeal to the Privy Council. Possibly it may turn out that the Privy Council, while allowing an appeal in the McDermott case, will refuse it in this, for I see a great difference between the two cases. I stated the other day that I thought there was a statute that granted the right of appeal in cases where the penalty exceeded £100. I find that such is the case. (Con. Stat. Lower Canada, cap. 105, sec. 6.) The power is given, though I do not remember any appeal having been brought under it before the Privy Council. The judgment of the Court is that the writ having issued illegally and improvidently, must be quashed.

DRUMMOND, J., concurred.

Mr. Ramsay. I move for leave to appeal to the Privy Council, and although this question has been incidentally decided already, I wish to show in what that decision appears to me erroneous, as it was given on a consideration suggested by the Court, and which I had not an opportunity of answering. I claim my appeal as of right on these words, that there shall be an appeal to Her Majesty in her Privy Council, "where the matter in question relates to any fee of office, &c., or any sum of money payable to Her Majesty." This relates to a sum of money payable to Her Majesty; but it is said fines are excluded, because there is a special statute (cap. 105, C. S. L. C.) which gives an appeal when the fine is over £100. But that statute was prior to the statute I invoke, and if incompatible the earlier must yield to the later. There is a case in 1 A. & E., R. v. Wright, where any was declared to cover all.

[DUVAL, C. J. But it is in the Consolidated Statutes.]

Yes, but it must be remembered that the statutes do not lose their original order of date by the consolidation.

[DUVAL, C. J. That is correct.]

Well, the statute I invoke gives me the appeal in express words. This case has been dismissed in the same way as if it had been

dismissed on a preliminary plea. Now it will not be denied that if the matter in question be appealable, the appeal lies whether the case is dismissed on a question of jurisdiction or on the merits.

DUVAL, C. J. This is the last day of the term, and it would be of no use to take the matter *en délibéré*; besides you will not lose any right by our refusing the appeal, which I hope may be taken.

The plaintiff in error, in person.

G. Oulmet, for the Crown.

[ADDENDUM. We have to correct an inaccuracy which occurs in the report of this case on page 233. Not having heard the argument of Mr. RAMSAY, yet being desirous of giving fully all that had been urged by the losing party, we followed a newspaper report which appeared to have received that gentleman's revision. We have since learned that the statement made therein respecting Driscoll's case is totally unfounded. The impression is conveyed to the reader that Chief Justice ROLLAND refused to sit during the proceedings, because, being the judge who suggested the contempt, he believed himself incompetent. Now, the register shows that in point of fact Chief Justice ROLLAND presided on Tuesday, the 11th day of April, 1864, the day the rule issued, and if he was not present on every occasion, the sole reason was that he feared to be subjected to fresh insult.

We may add here that during the last term of the Court of Queen's Bench sitting on the Crown side, Mr. Justice DRUMMOND attended the sitting of the Court (which was being held under the presidency of Mr. Justice MONDELET), and having caused the judgment quashing the Writ of Error to be read and entered on the minutes, ordered the Sheriff to see that the judgment was executed. Mr. RAMSAY stated that the Sheriff had received an intimation from the Crown that the judgment was not to be pressed pending his application to the Privy Council; but Mr. Justice DRUMMOND having replied that the Sheriff must obey the order of the Court or abide the consequences, Mr. RAMSAY subsequently paid £10, amount of the fine imposed. We understand that steps have been taken to bring the case before the Privy Council.]

March 5.

MORGAN ET AL., (plaintiffs in the Court below) Appellants; and GAUVREAU, (defendant and petitioner in the Court below) Respondent.

Community—Cohabitation as man and wife—Liability.

The defendant cohabited for many years with a woman, whom he held out to the world as his wife, and in a deed of lease he described himself and her as *communs en biens*. The woman carried on business as a milliner, and the defendant, her husband, as a repairer of hats in the same premises, but all the receipts of both went into the millinery account. He also ordered goods and made payments in her name. After her decease, the plaintiffs, creditors, having subjected his estate to compulsory liquidation for a debt of the community, the defendant alleged *inter alia* that he was not married to the woman, and, therefore, not liable for her debts.

Held, that under the circumstances, the defendant was liable for the debts of the deceased, whether married or not married, inasmuch as he had held her out to the world as his wife, and she was presumed to act for him.

This was an appeal from a judgment rendered by Monk, J., in the Superior Court at Montreal, on the 20th October, 1866.

On the 23rd August, 1866, the appellants, under the provisions of the Insolvent Act of 1864, took proceedings in compulsory liquidation against the respondent. The writ issued on affidavit, and was returned on the 1st September. On the 6th September, the defendant petitioned that the proceedings taken against him be set aside and quashed, alleging that the plaintiffs were not his creditors; that he never transacted with them; that he had never been a trader, but only a hatter, and did not owe in all \$200.

The plaintiffs answered in writing that they were creditors of the defendant for goods sold to him and his wife, with whom he was *commun en biens*, as appeared by a deed of lease produced; that the defendant was a trader, and subject to the Insolvent Act. To this answer the defendant subsequently filed a *réplique*, alleging that the person mentioned in the plaintiffs' answer as his wife, was not his wife, as they had never been married; and that he appeared to authorize her in the

lease produced merely for the purpose of concealing from the public the state of concubinage in which he lived with this woman, who died in August, 1866; that she was a *commerçante-modiste* doing business at Montreal, and that it was to her alone the goods were sold. The plaintiffs moved to reject this *réplique*, but the motion was refused. After *enquête*, judgment was rendered by Monk, J., granting the petition, and quashing all the proceedings. From this judgment the plaintiffs appealed.

On behalf of the appellants it was submitted that the replication was improperly filed, and contained matter which should have been stated in the petition. Further, that the defendant was a trader within the meaning of the Insolvent Act. The defendant had attempted to evade liability by alleging that he had never been married to Madame Gauvreau, and that the debt was hers; but, it was contended, he had rendered himself liable for the debt, whether married or not married. He had ordered goods, and was supported by the proceeds of his wife's millinery business. Creditors had a right to consider her as his wife *commune en biens* with him.

For the respondent it was contended that he had never been a trader; that he did not buy the goods in question from the appellants; but that the woman Flavie Clément, *dite Larivée*, who kept the shop, was the real debtor; that he had never been married to her, and could not be held liable for her debts as *commun en biens* with her.

BADGLEY, J. This is an appeal from proceedings in insolvency. Upon the 23rd of August, 1866, a writ of attachment issued upon affidavit filed. The writ was returned on the 1st September, and on the 6th, the respondent filed his petition to quash. The Act contemplated and provided no other proceeding, the insolvent procedure being necessarily summary; but the appellants answered in writing under a judicial order, and thereupon the respondent opened his *enquête*, and made proof in support of his petition. Whilst the *enquête* was proceeding, the respondent filed a *réplique* to the appellant's answer, but without permission, in which he made allegations which should have been in the petition.

All this is wrong, and should not have been allowed without judicial sanction. The statute gives to the alleged insolvent, power to petition, on grounds shown, to quash the attachment, but the delay is strictly limited to five days from the return and not longer, and it is upon those grounds in the petition that the quashing of the writ is sought. The Court has no power to prolong the delay or to allow subsequent allegations of other grounds or facts, which would necessarily set aside not only the statutory delays, but also the petition itself; because the quashing might in fact be made to rest, not upon the allegations of the petition, but upon the new facts set up in a pleading put in at any time afterwards. I think all this proceeding faulty, and contrary to the statutory procedure.

But what are the merits? The writ of attachment issued on affidavit duly made, and under it seizure was made in the respondent's premises of the stock of goods in the shop, and other effects as set out in the *procès-verbal* filed of record. The respondent's petition to quash sets out these proceedings and the seizure made in his premises; that the appellants are not his creditors; that he owes them nothing; that he never was a trader, but only a hatter; that he did not owe \$200. Wherefore he prays that the writ be quashed; that the seizure thereunder be set aside; that *main levée* be granted to him of the effects seized as *his property*. The appellants, as above stated, answered in writing. After this, the respondent files a *réplique* to the answer, in which he alleges that the woman Gauvreau was not his wife; that she traded for herself, and was credited for herself by the appellants and others, and that her stock is there upon which the creditors may act, but not against him.

The two main points are: 1st. Was the respondent a trader? 2. Were the appellants his creditors? The first point seems to have been clearly proved. He and the deceased cohabited for twelve or thirteen years, occupying the same premises all that time. In part of the premises she had a millinery shop, and he in the other part a workshop for the repair and renewal of hats, supplied to him by merchants who furnished

goods to his wife. The appellants have also proved his personal purchase of goods for the shop from the appellants and others, ordering them to be sent to the shop; his payments to creditors for goods purchased; his admission of the business being common to both; that the money due for his *specialités* went in deduction of the account for goods purchased for the millinery business; finally, his own admission in a deed of lease of their premises, dated 10th July, 1865, that he was a *commerçant*. He cannot escape the result of this proof that he is a *commerçant*.

The second point is, was he indebted to the appellants? On this head, we have the facts of cohabitation and residence; his application for hat-work and repairs, not to be paid in money to him, but to be credited on the millinery account; his participation in the business in the name of his wife, by buying, selling and paying, all proved by the evidence of record. In addition to this positive testimony, which proves his communal quality as well as his indebtedness to the appellants, we have his own admissions. It has been objected that the entries in the appellants' books are in the name of Mme. Gauvreau. But this objection amounts to nothing, for the witnesses assert that the entries are always so made where the woman is a milliner, and it is well known that in a haberdasher's shop, where families are supplied, the entries are almost universally made in the name of the wife, not the husband. But, it is objected that she was not his wife. Two clergymen have been brought up who say, that they looked over the parish registers and found no trace of the marriage. But negative allegations and proofs of want of marriage between them cannot be allowed to override their mutual frequent assertions of being man and wife, and his own affirmation and positive admission that she was his wife and that she was *commune en biens* with him. He must be held liable solidarily with her for the debts, because she is legally presumed to act for him. It has been held that when a wife living with her husband carries on trade, it is to be presumed that she does so by his authority, and as his agent. It might be different if they did not cohabit. If she were not his wife, in fact, his cohabitation with her, her use of his name

his purchases and sales of goods, &c., make him liable. Even supposing that she was not his wife, she is presumed to be doing business as his agent, and therefore, his liability is unquestionable. He has, moreover, by his petition rendered his position entirely untenable, by claiming the millinery goods seized as his own property and demanding their discharge from the attachment. The judgment has maintained this demand. We therefore set aside the judgment appealed from.

DAUMOND, J. The rule of law is well established that where a man and woman live together as man and wife, they are equally liable as if they had been married. A contrary doctrine would lead to the absurd result, that no merchant would give credit to a lady describing herself as married unless she exhibited the marriage certificate. Whether married or not married, Gauvreau and this woman cohabited as man and wife, and the defendant is clearly liable.

AYLWIN, J. In this place I think it my duty to state that a more infamous attempt to evade liability has never been made within my knowledge. It is a most scandalous, most disgraceful attempt.

MONDELET, J., concurred.

The following is the judgment recorded :

Considering that the appellants have established by legal and sufficient evidence, the allegations, matters, and things set forth in the affidavit by them filed in this cause, and upon which the writ of attachment in insolvency issued in this cause; considering that the respondent has failed to establish by sufficient evidence the non-subjection of his estate to involuntary liquidation, and his avoidance of the said allegations, matters and things, in the said affidavit contained; considering that the said writ of attachment was duly issued, and the seizure and proceedings thereunder were duly had and made; considering that in the said judgment of the Superior Court there was error, this court doth reverse and set aside the said judgment, and maintain the said writ of attachment, &c.

Perkins & Stephens, for the Appellants.

Labells & David, for the Respondent.

March 4th.

TAYLOR v. MULLIN.

Practice—Appeal—Final Judgment.

A judgment having been rendered by the Superior Court, under the Municipal Act of Lower Canada, the defendant inscribed the case for hearing in review. The Court of Review, on motion, rejected the inscription. The defendant having moved for leave to appeal from this judgment as from an interlocutory judgment:—

Held, that the judgment of the Court of Review rejecting the inscription was a final judgment, and could only be appealed from as such.

Devlin, for the defendant, James E. Mullin, moved for leave to appeal from an interlocutory judgment rendered by the Court of Review in December last, (*Vide*, ante, p. 200.) The action had been brought for the purpose of expelling Mr. Mullin from his seat in the City Council of Montreal, and a judgment of expulsion was rendered in the Superior Court by MORRIS, J. The defendant inscribed this judgment for review, but in December last, the Court of Review, holding that the judgment was not susceptible of revision, granted the plaintiff's motion that the inscription be rejected. It was from this judgment of the Court of Review, that the defendant asked leave to appeal.

[DUVAL, C. J. How can you consider a judgment, which excluded you from being heard, as an interlocutory judgment? It must be treated as a final judgment.]

Under the statute we have no right to an appeal *de plano*, as the right to appeal from judgments under the Municipal Act has been taken away.

[DUVAL, C. J. The right of appeal was taken away by the Legislature on public grounds. It is evidently of the greatest importance that these cases should be disposed of with the utmost despatch consistent with the rights of the parties. For a dozen seats might be contested, and in the meantime how could the business of the city be carried on?]

Abbott, Q. C., for the plaintiff. The judgment of the Court of Review was manifestly final.

DUVAL, C. J. The Court is unanimous that

the judgment of the Court of Review was a final judgment, and consequently the motion of the defendant, asking leave to appeal from it as from an interlocutory judgment, must be dismissed with costs.

AYLWIN, DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

Abbott, Q. C., for the Plaintiff.

Devlin, for the Defendant.

March 5th.

SACHE (defendant in the Court below), Appellant; and COURVILLE ET AL. (plaintiffs in the Court below), Respondents.

Action to compel proprietor to make repairs.

The lessees of a house brought an action against a person who had become proprietor during the existence of the lease, to compel him to make repairs.

Held, that the action was rightly brought against the defendant, though he was not the immediate lessor.

This was an appeal from a judgment of the Superior Court, rendered at Montreal on the 12th April, 1864, by *Monk, J.*, in favor of the plaintiff.

The action was brought under the Lessor's and Lessee's Act, for the purpose of compelling the defendant to make certain repairs to a house occupied by the plaintiffs. The defendant had become proprietor of the house during the existence of a lease from one John Ostell to the plaintiffs.

The plea of the defendant was that he had made all the repairs he was bound to make. After *enquête*, the defendant amended his plea by inserting the averment, that he had never been put *en demeure* to make any repairs, that he only became proprietor during the lease, and could not be held liable to make repairs to a property not belonging to him.

By the judgment of the Court below, from which the present appeal was instituted, the defendant was condemned, within eight days, to put the premises in good repair, in default of which, the plaintiffs were authorized to make the repairs at the defendant's expense.

For the appellant it was represented that he became proprietor of the premises during the lease. The lease was from John Ostell to the plaintiffs, dated 22nd February, 1862; it was continued by *tacite reconduction*,

from 1st May, 1863, to 1st May, 1864. The defendant became proprietor on the 7th January, 1864; the action was instituted against him on the 28th January, 1864, and he sold the property on the 16th March following, so that the judgment rendered against him on the 12th April, 1864, condemned him to make repairs to a house into which he no longer had a right to enter. Further, he had not been put *en demeure*.

For the respondent it was contended that it was proved the defendant on being requested to make repairs had refused to do so, and, in any case, the action was sufficient to put him *en demeure*. The defendant, if he wished to avoid liability for costs, should have offered to make the repairs immediately on being served with the writ, or by his plea, and not have waited till the plaintiffs, after a long *enquête*, had proved that the premises were uninhabitable.

AYLWIN, J. This was an action brought under the Landlord and Tenant's Act. The ground upon which this appeal has been brought is that the suit is an action of damages, and that the action has been brought by the plaintiffs against a person who is not the immediate landlord; that the premises were purchased by Sache, the present appellant, from one John Ostell, who leased them to the plaintiffs. The other pretension of the appellant is that the damaged state of the premises has not been proved. Now, in the first place, the action is not an action of damages; it is an action to compel the defendant to repair, and the obligation to keep the premises in proper repair was equally binding upon Sache as upon Ostell, his *outour*. Then, as to the state of the premises, there is certainly a contrariety of testimony, but still the evidence is of such a description as to satisfy us that the judgment was right and must be confirmed with costs.

DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

R. & G. Laflamme, for the Appellant.

Louis Ricard, for the Respondents.

March 5th.

WILSON (plaintiff in the Court below), Appellant; and DEMERS (defendant in the Court below), Respondent.

Statute of Limitations—Demurrer.

In an action on a promissory note, made more than five years previous to the institution of the action, the plaintiff alleged in his declaration, that by the law of New York State, where the note was made, and of Wisconsin, where the note was payable, the fact of the defendant's absence from his domicile suspended the Statute of Limitations. To this the defendant demurred, on the ground that it was the *lex fori*, the law of Lower Canada, which applied.

Held, (reversing the judgment of the Superior Court), that the plaintiff's action could not be dismissed on this demurrer, as there were allegations of fact in the declaration irrespective of those upon which the demurrer was founded.

(Per AYLWIN, and BADGLEY, JJ. *Held*, that the Statute of Limitations must be pleaded by an exception, and cannot be put in issue by a demurrer.)

This was an appeal from a judgment rendered in the Superior Court by *Berthelot, J.*, on the 9th of July, 1866, maintaining a *défense en droit*, filed by the defendant.

The action was brought on a promissory note. The declaration set out that the defendant, (who was then carrying on business in partnership with his brother, Hector Demers, in Fond du Lac, Wisconsin, under the name of Demers, Bros.,) on the 12th of September, 1857, at the city of New York, gave to the firm of L. O. Wilson & Co., of that city, a promissory note, signed by Demers Bros., for \$1120.47, payable four months after date, at Fond du Lac. L. O. Wilson & Co. transferred this note to the plaintiff at maturity; it was protested for non-payment, and about the date of protest, the defendant and his brother left their domicile in Fond du Lac. Since then up to the 19th of April, 1866, the plaintiff had failed to discover their whereabouts,—but he at length ascertained that they were in Lower Canada. That by the laws of New York and Wisconsin, the absence of the defendant suspended the Statute of Limitations, and gave the plaintiff a right to sue for the amount of the note.

To this declaration the defendant demurred, on the ground that the note in question was not subject to foreign law, *lex loci contractus*, but to the law of Lower Canada, and was pre-

scribed. This demurrer being maintained, and the action dismissed, the plaintiff appealed.

Popham, for the Appellant. 1st. The question is one to be decided by Private International Law, and, according to the opinion of the majority of writers on this department, the *lex loci contractus*, or the law of the place where the note was made payable, should be applied to the case. 2nd. Even if the *lex fori* be applied, the allegations in the declaration raise questions of fact, which exempt them from a demurrer. 3rd. Admitting the declaration to be demurrable, the demurrer should not have been based on the Statute of Limitations as in this case.

Girouard, for the respondent. The decision of the Court below is fully justified by the dispositions of our Statutory law, and also by the international jurisprudence of all countries where the English enactments respecting prescription have been adopted. It may be said that this question could not be raised by a demurrer. But the plaintiff himself provoked the demurrer by setting out in his declaration that the note, not being prescribed by the law of the country where it was made, or where it was payable, was not prescribed here. The defendant merely answered, that supposing the facts alleged in the declaration to be true, he had nothing to do with the *lex loci contractus*, but only with the law of this country.

DUMMOND, J. [After stating the facts set out in the declaration]. The plaintiff, apparently foreseeing the exception that might be set up, has stated his case in such a way as to meet that exception. The *défense en droit* filed by the defendant is very irregular, being partly an exception and partly a demurrer. The plaintiff alleges that the law of the place where the note was made or where it was payable, should govern; and then the defendant says, your action is ill founded, because it is not the law of the place where the note was made or where it was payable, but the law of Lower Canada, that applies. I am inclined to think, however, that this demurrer, so far as it goes, is good. There is a difference of opinion on this point; but we are all of opinion that the demurrer does not meet the whole case. It does not meet the allegation of inter-

ruption of prescription by the defendant's absence; and, therefore, taking whatever view you please of this *défense en droit*, the Court below was in error in dismissing the whole action upon it. The judgment of this Court has been drawn so as to reconcile the slight difference of opinion on the point referred to.

BADGLEY, J. The declaration sets out defendant's promissory note dated in 1857, in Michigan, and payable at four months from date, and was met by a *défense en droit*, demurrer, which was sustained by the Superior Court, and the action in consequence dismissed; the judgment resting on the ground that the *demande* on the face of the declaration was by law obnoxious to our Statutory Limitation for promissory notes. That may or may not be the case, but the limitation cannot be put in issue by a demurrer. The essential constituent of limitation, as of our prescription, is time, and without it both words are mere legal abstractions. This time ingredient is a fact which may be legally avoided by other facts in contradiction or waiver of it, and therefore necessitates a special plea of the limitation relied upon, in order to form a bar to the action; for the obvious reason, to enable plaintiff to show in his replication any fact sufficient to avoid the bar. Our own prescriptions require to be pleaded, and may not be supplied by the Court; and so in England, the limitation, in like manner, must be pleaded, as shown in the following case: in which "the declaration alleged a promise made at a certain time, for money lent, and after verdict it was moved in arrest of judgment, that the cause of action did not accrue within six years before action brought. But the plaintiff had judgment; for though the cause of action appeared to be twenty years before action brought, yet the plaintiff shall recover, if the defendant do not plead the Statute, which was made for the use of those who would take advantage of it, but the Court shall not give the defendant the advantage of it if he will not plead it." These facts cannot form an issue in law, and the judgment therefore sustaining the *défense en droit* cannot be maintained.

ATLWIN, J. In one word, the ground of the demurrer is the Statute of Limitations, but the Statute of Limitations could only be plead-

ed by an exception: therefore, the demurrer is worse than the original declaration.

MONDRIET, J., concurred in the judgment.

The judgment was *motivé* as follows: Considering that the declaration contains allegations of fact, entirely irrespective of those upon which the *défense en droit* is founded, allegations which could not be disposed of in adjudicating upon said *défense en droit*; considering that the said *défense en droit* is irregular and insufficient; considering therefore that in the judgment appealed from, there is error, &c. Judgment reversed, and record ordered to be remitted to Court below.

J. Popham, for the Appellant.

D. Girouard, for the Respondent.

CIRCUIT COURT.

Quebec, Nov. 24, 1866.

BROWN v. THE QUEBEC BANK.

Payment—Deficiency in packages of silver.

Held, that banking institutions are not liable for any deficit in packages of silver paid out by them, unless the silver be counted and the deficit made known before the packages are taken from the bank.

This was an action brought to recover \$20, which was claimed as so much money which the Bank had short paid on a cheque. It appears that a cheque for \$830 was drawn; and on presentation of it, eight packages, said to contain \$100 each, and three packages containing ten dollars each, were paid to the clerk presenting the cheque. The money was taken from the banking-house without being counted; but within ten minutes, the packages were counted over at a broker's office; and one of the \$100 packages was found to contain but \$80. The clerk returned to the Bank with the package, and demanded the \$20. The Bank refused to entertain the claim.

At the *enquête* the fact of the deficiency was clearly proved, and in arguing the case the counsel for the plaintiff urged, that the only question to be decided in this case was whether the plaintiff did or did not receive from the bank the amount specified in his cheque. It was clearly proved that he did not, and that there was still \$20 due on the cheque. It was clear, therefore, that the plaintiff ought to have that sum, and that the Quebec Bank

ought not to be allowed to violate the well-known principle of law: "Personne ne peut s'enrichir au dépens d'autrui."

For the defendants it was urged that if the plaintiff's demand was maintained, it would open a way to unlimited fraud, and that the ends of justice would be better accomplished by releasing banks from liability for any deficiency in packages of silver paid out by them, unless the same was ascertained at the counter of the bank, even though in some cases individuals should suffer. It was argued also that the fact of the following notice having been stuck up in prominent places about the bank in large printed letters, was a sufficient ground for the dismissal of the plaintiff's action, it forming, as was maintained, a quasi-contract between the bank and parties dealing with it, who thus had a knowledge of the custom of the bank. The notice was in these words:—

"Parties are requested to count money paid at the counter before the same is taken from it, as the bank will not hold itself responsible for any deficiency in silver, or in the payment of notes, after the same have been taken from the counter."

STUART, J. Although the amount involved in this action is small, still it is one of some interest and importance to the mercantile community in general, and more especially to money and exchange brokers; and it is after mature deliberation that I have come to the conclusion that judgment ought to be given in favour of the defendants; for, did I decide otherwise, the case, as a precedent, would open the way to many frauds, by dishonest persons obtaining moneys from banking offices. Moreover, it has been seen to be the general and well-known custom of the banks not to make good deficiencies, which have not been noted before the money has been taken from their counter; and this custom the Quebec Bank further upheld by the notices, referred to in the pleadings, which were posted up in conspicuous places about the bank. Besides, the rule is made and acted upon in the interest of both parties; for, if there were a surplus instead of a deficiency in the amount delivered, the error, being discovered before the eyes of one of the bank's employees, would be more likely to be rectified than if only found

out sometime afterwards, when the overplus might easily be ascribed to some other cause. For these reasons, therefore, the plaintiff's action is dismissed with costs.

Stuart & Murphy, for the Plaintiffs.

F. C. Vannorous, for the Defendants.

(I. T. W.)

RECENT ENGLISH DECISIONS.

QUEEN'S BENCH.

Ship—Proof of ownership prima facie evidence of employment of those on board.—A ship was laid up in a public dock for the winter, under the care of a shipkeeper; the plaintiff, being lawfully on board, suffered injury from the negligence of the persons in charge of the ship, and brought an action against the defendant. At the trial there was no evidence by whom the shipkeeper was appointed, and the only evidence to fix the defendant with liability was the ship's register, on which his name appeared as owner:—*Held* (by Blackburn and Lush, JJ.; Mellor, J., dissenting), that the register was *prima facie* evidence for the jury, from which they might draw the inference that the persons in charge of the ship were employed by the defendant. *Hibbs v. Ross*, Law Rep. 1 Q. B. 534.

Bailment of Pawn or Pledge—Interest under original Pledge not determined by Repledge.—A deposited debentures with B as a security for the payment, at maturity, of a bill endorsed by A and discounted by B, on the agreement that B should have power to sell or otherwise dispose of the debentures if the bill should not be paid when due. Before the maturity of the bill, B deposited the debentures with C, to be kept by him as a security until the repayment of a loan from C to B larger than the amount of the bill. The bill was dishonored, and while it still remained unpaid, A brought *detinue* against C for the debentures:—*Held*, that the repledge by B to C did not put an end to the contract of pledge between A and B, and B's interest and right of detainer under it; and that A, therefore, could not maintain *detinue* without having paid or tendered the amount of the bill.—Blackburn, J., remarked in the course of his opinion, "I think that the subpledging of goods, held in

security for money, before the money is due, is not in general so inconsistent with the contract, as to amount to a renunciation of that contract. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody." Cockburn, C. J., said: "The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action, —for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged." *Donald v. Suckling*, Law Rep. 1 Q. B. 585.

Corporation—Contract not under Seal.

The plaintiff supplied coals from time to time to the defendants, the guardians of a poor-law union, for the use of their work-house, under articles of agreement between the plaintiff and the defendants, executed by the plaintiff, but not under the seal of the defendants. The defendants received and used some of the coals. In an action for goods sold and delivered:—*Held*, that as the goods had been supplied and accepted by the defendants, and were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, the defendants were liable to pay for the coals although the contract was not under seal. *Nicholson v. Bradfield Union*, Law Rep. 1 Q. B. 620.

Libel—Inadequacy of Damages.—The plaintiff brought an action against the defendant for having published in a Liverpool newspaper, of which the defendant was proprietor, a series of libels, of a gross and offensive character, on the plaintiff as the incumbent of a church in Liverpool. It appeared at the trial that

the first libel originated in the plaintiff having preached and published in the local papers two sermons, reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew their mayor; and the plaintiff had, soon after the libels had commenced, alluded, in a letter to another newspaper, to the defendant's paper as the "dregs of provincial journalism;" and he had also delivered from the pulpit and published a statement, to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault for which the plaintiff had been fined 5s. The jury having returned a verdict for a farthing damages, the plaintiff obtained a rule for a new trial on the ground of the inadequacy of the damages:—*Held*, that, although on account of the grossness and repetition of the libels, the verdict, in the opinion of the Court, might well have been for larger damages, it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to; and that the Court ought not to interfere. *Kelly v. Sherlock*, Law Rep. 1 Q. B. 686.

Libel—Matter of Public Interest.—A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, and by turning the vestry-room into a cooking apartment, the correspondence was published without the plaintiff's permission in the defendant's newspaper, with comments on the plaintiff's conduct:—*Held*, that this was a matter of public interest, which might be made the subject of public discussion; and that the publication was, therefore, not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified. *Kelly v. Tinsling*, Law Rep. 1 Q. B. 699.

Nuisance—Master and Servant—Master liable on Indictment for act of Servant.—The owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by the acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to

his general orders. *The Queen v. Stephens*, Law Rep. 1 Q. B. 702.

Liability of Commissioners for a public purpose.—By an act of parliament, drainage commissioners were to make and maintain a cut and sluice; the sluice burst, owing to the negligence of the servants of the commissioners, and damage having ensued to the plaintiff's land, he brought an action against the commissioners, in the name of their clerk:—*Held*, on the authority of the *Mersey Docks* cases (ante, p. 173), that the commissioners were not exempt from liability by reason of their being commissioners for a public purpose; and that the duty being imposed upon them of maintaining the sluice, they were liable for the damage caused by the negligent performance of that duty by their servants. *Coe v. Wise*, Law Rep. 1 Q. B. 711.

COMMON PLEAS.

Carriers—Delivery within reasonable time—Delay caused by third persons.—A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case; and he is not responsible for the consequences of delay arising from causes beyond his control. The defendants, a railway company, were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time. The obstruction was caused by an accident resulting solely from the negligence of another company who had, under an agreement with the defendants, sanctioned by act of parliament, running powers over their line:—*Held*, that the defendants were not liable to the plaintiff for damage to his goods caused by the delay.

This decision reversed the judgment of the Lincolnshire County Court, which held the defendants liable. The action was brought to recover damages sustained by the plaintiff in consequence of a delay in the delivery of three hampers of poultry, which he had sent by the defendants' railway for the early London market. There was no special contract made by the defendants to deliver the goods in time for any particular market. The delay was wholly

occasioned by an accident which occurred on the defendants' line between Hitchin and London, to a train of the Midland Railway Company, who have running powers over that portion of the defendants' line. The accident resulted solely from the negligence of the servants of the Midland Railway Company. The County Court judge decided in favor of the plaintiff, on the ground that as the Midland Railway Company used the said railway by the permission of the defendants, the latter were responsible for delay caused by the negligence of the former company, and, therefore, that the delivery in this case was not within a reasonable time. On appeal, it was urged on behalf of the plaintiff that, if he could not recover in this action, he had no remedy, as there was no privity between the Midland Railway Company and him.

ERLE, C. J., said: "I am of opinion that our judgment should be for the defendants. I think a common carrier's duty to deliver safely has nothing to do with the time of delivery. That is a matter of contract, and when, as in the present case, there is no express contract, there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver, using all reasonable exertions. The ground upon which the decision went against the defendants was that, as the Midland Railway Company used the Great Northern line by the defendants' permission, the defendants were responsible for a delay caused by the Midland Company on their Great Northern line. But in so deciding I think the County Court judge took an erroneous view of the relations between the two companies. The legislature have declared by many acts that it is for the public advantage that railway companies should have running powers over each other's lines, and it has specially declared it to be so in the case of the present agreement. The Midland Railway Company, therefore, were not merely using the line by the defendants' permission, but were exercising a statutory right, and the defendants were not responsible for their acts." *Taylor v. The Great Northern Railway Co.*, Law Rep. 1 C. P. 385.

Rules of Descent—Attainder—Civil Death.

—A. having been attainted of treason escaped to a foreign country, and there married and had children, and was afterwards executed on the same attainder:—*Held*, first, that the marriage was valid, and the children legitimate. *Held*, secondly, that the descent of property between brothers is immediate, and not through their father; and that the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder. *Kynnaid v. Leslie*, Law Rep. 1 C. P. 389.

Sheriff—Escape—Measure of Damages.—

In an action against a sheriff for suffering a judgment debtor to escape, the jury, in estimating the value of the custody, may take into account not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life and surrounding circumstances, that the debt, or any portion of it, would have been discharged if he had remained in custody. Thus, in an action against a sheriff for an escape, it was proved that the debtor, though insolvent, was the only son of a wealthy father, who was upwards of 100 years old; and that, shortly before his arrest, the debtor's solicitor had offered to pay a composition on his debts of 6s. in the £. The judge directed the jury to give as damages the value to the plaintiff of the chance that the debt, or any portion of it, would have been extracted by the debtor's remaining in custody:—*Held*, a right direction; and the jury having given substantial damages the Court refused to disturb the verdict. *Macrae v. Clarke*, Law Rep. 1 C. P. 403.

Statute of Frauds (29 Car. II., c. 3), s. 17.

—*Memorandum of the bargain.*—A. having sold some cheeses and candles to B., sent him an invoice of the goods. B. returned the invoice with a note, signed by him, on the back to the following effect: "The cheese came to day, but I did not take them in for they were badly crushed. So the candles and cheese is returned:—" *Held*, that the contents of the invoice were sufficiently referred to by the note on the back of it, and that the two together constituted a sufficient memorandum in writing of the bargain to satisfy the Statute of Frauds. *Wilkinson v. Evans*, Law Rep. 1 C. P. 407.

Marine Insurance—Implied Warranty of Seaworthiness—Landing by Lighters.—

The warranty of seaworthiness which is implied as to the ship in an ordinary policy of marine insurance, does not extend to lighters employed to land the cargo. Therefore, to a declaration on an ordinary policy on goods from Liverpool to Melbourne, "including all risk to and from the ship," the policy to endure until the goods should be discharged and safely landed at Melbourne, alleging damage by perils insured against, a plea—that the damage happened after the goods had been discharged from the ship, and while they were in a lighter for the purpose of being conveyed to the shore, that the lighter was not seaworthy for the purpose, and that the damage was caused solely by such unseaworthiness—affords no defence.—*Erle, C. J.*, remarked: "I think that when the ship is seaworthy at the commencement of the voyage the insurer is responsible for all the ordinary incidents arising in the course of the voyage, and that where, as here, the contract of insurance is upon goods from their shipment until their landing, if one of the ordinary incidents of the voyage is the hiring of local lighters, the insurer must bear the consequences of such local lighters not being qualified to land the goods in safety." *Lane v. Nizon*, Law Rep. 1 C. P. 412.

Unpaid Vendor—Stoppage in transitu.—

On the 12th of July, 1864, W. sold P. eleven skips of cotton twist, then lying at the defendants' station at S., to be delivered for P. at B. station. Three of the skips were delivered on the 22nd, and paid for; but P., objecting to the weight and quality, declined to take any more of them. On the 17th of August, four more were sent to B. station, and an invoice of the eight was sent to P., with an intimation to him that four had been forwarded, and that the remaining four were lying at S. station waiting his instructions. P. immediately returned the invoice, and wrote to W., saying that he declined to take any more of the twist. On the 1st of September, W. sent an order to S. station, directing the defendants to deliver the remaining four skips to P. These were accordingly forwarded to B. station, and were taken by P.'s carman to his mill, but were immediately returned by P.'s orders; and

the whole eight were sent back by him to S. station to the order of W. They were again returned by W. to B. station; but P. refusing to have anything to do with them, they remained there until P.'s bankruptcy on the 19th of October, when W. claimed them:—*Held*, upon a special case stated in an action of trover by P.'s assignee against the railway company, in which the Court were to draw inferences of fact, that, under the circumstances, the transitus was never determined, and consequently that the unpaid vendor, W., had a right to stop them. *Bolton v. The Lancashire and Yorkshire Railway Co.*, Law Rep. 1 C. P. 431.

Vendor and Purchaser.—The rule in *Fisrean v. Thornhill*, 2 W. Bl. 1078, that, where a contract for the sale of real estate goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages for the loss of the bargain, does not apply to the case of a lease granted by one who has no title to grant it. *Lock v. Furne*, Law Rep. 1 C. P. 441.

Bill of Exchange—Acceptance for Honor—Forgery.—A bill purporting to be drawn by A. at Lima, upon B. at Liverpool, payable to the order of C., and indorsed by C. to D., and by D. in blank, was presented for acceptance to B., by a person who represented himself to be D. B., having stopped payment, refused to accept, but gave the person who presented it a letter to the plaintiffs, discount-brokers in London, with an intimation that the defendant, the London correspondent of A., would probably accept the bill for A.'s honor. The plaintiffs took the bill and B.'s letter to the defendant, and he, assuming the bill to be genuine, accepted it for the honor of the supposed drawer, and the plaintiffs thereupon discounted it. The drawing and indorsements turned out to be forgeries. In an action by the plaintiffs to recover the amount of the bill from the defendant:—*Held*, that the defendant, having induced the plaintiffs to part with the money upon the faith of his authentication of the bill, was estopped from denying its genuineness; and, *semble*, that, the payee being a fictitious or non-existing person, the bill was to be taken to be a bill payable to bearer. *Phillips v. the Thurn*, Law Rep. 1 C. P. 463.

Vendor and Purchaser.—By a memorandum of agreement, A. agreed to purchase from B. certain lands, therein described, and all the mines, beds, and veins of coal, &c., under the same, at a certain price; and B. agreed to purchase from A. all coal that he might from time to time require, at a fair market price:—*Held*, that these were concurrent acts; and that A. could not sue B. for not taking the coal, without averring performance or a readiness to perform his part of the agreement. *Bankart v. Bowers*, Law Rep. 1 C. P. 484.

Railway Company, acceptance of Bills of Exchange by—Ultra vires.—It is not competent to a company incorporated in the usual way for the formation and working of a railway, to draw, accept, or indorse bills of exchange; and the question is properly raised by a plea denying the acceptance, though the acceptance was given by order of the directors, and under the common seal of the company.—*Erle, C. J.*, observed: "These were actions by the indorsees against the acceptors of several bills of exchange. The defendants pleaded in each action that they did not accept. It appeared that the defendants are a company incorporated by an act, 22 & 23 Vict. c. 63, for the purpose of making and working a railway in Wales. The question is whether this company, being a corporation created for the specific purpose of making a railway, can lawfully bind itself by accepting a bill of exchange. I am of opinion that it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments, that they should be valid or not according as the consideration between the original parties was good or bad,—or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on a loan beyond their borrowing powers. It

would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by an indorsee, but in respect of the latter not. So much for the general bearing of the question upon principle. How stands the matter as to authority? Subject to these exceptions, I find no case in which an action upon a bill of exchange or promissory note has been sustained against a corporation: and these exceptions prove the rule."—Byles, J., said: "These cases are of great importance, raising, as I believe they do for the first time, the precise question whether it is competent to a railway company to accept bills of exchange. No precedent has been cited in support of the affirmative; and I cannot but feel that, if we intimated any doubt upon the matter, the market would in a short time be inundated with acceptances by railway companies. Only three instances can be cited of the acceptance of negotiable instruments by corporations. The first is that of the Bank of England; but that establishment was incorporated for the very purpose,—its promissory notes and bank post bills forming a very large portion of the circulating medium of this country. The second is that of the East India Company: there, the authority to draw, accept, and indorse bills and notes, if not created, is at all events ratified and confirmed, by two acts of parliament, the 9 & 10 Wm. III, c. 44, and 56 Geo. 3, c. 155. The third instance is that of *Stark v. Highgate Archway Company*, (5 Taunt. 792) where the company had express authority to give bills."—Montague Smith, J., observed: "I think it was not the intention of the legislature that they should accept bills at all. The shareholders advance their money upon the faith of the limited borrowing powers. This limit would be illusory if the directors could be held bound by acceptances. There is no authority to show that they have power to accept, and there is much authority in analogous cases the other way. It has been held that mining companies, waterworks companies, gas companies, salt and alkali companies, and many others, all more in the nature of trading companies than this company, are incapable of drawing, accepting, or indorsing bills of exchange. The first object of a railway company

is the making of a railway, though they may and practically always do carry on the business of carriers. That corporations created for the purpose of trading may have power to issue negotiable instruments is the well-known exception. But that applies where the primary object of the incorporation is the carrying on of trade as other persons carry it on, viz. by buying and selling." *Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. 499.

Principal and Surety.—Where a person enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent, does not release the surety from his contract of suretyship as to the other. *Harrison v. Seymour*, Law Rep. 1 C. P. 518.

Money Paid.—The plaintiff, under a bill of sale, seized goods on the defendant's premises, and with his knowledge, but without any express request, allowed them to remain there until rent became due. The landlord, having distrained them for rent, the plaintiff paid the rent and expenses, and freed his goods from the distress. Held, that this payment was not a compulsory payment by the plaintiff of a debt of the defendant, for his benefit or at his implied request, and that the plaintiff was not entitled to recover the amount. *England v. Marden*, Law Rep. 1 C. P. 529.

Shipping—Marine Insurance.—The ship *Sebastopol*, of which the plaintiffs were owners, was chartered for a voyage from the China Islands to the United Kingdom with a cargo of guano, at a freight payable on arrival at the port of discharge. The plaintiffs effected with the defendants a policy on the charter freight, which contained the usual suing and laboring clause, and the following warranty:—"warranted free from particular average, also from jettison, unless the ship be stranded, sunk or burnt." In the course of the voyage the vessel encountered a severe storm, and put into Rio, so damaged by perils of the sea as to be not worth repairing, and she was accordingly sold. The plaintiffs gave no notice of the abandonment, but the guano having been landed and warehoused at Rio, the master

procured another vessel, the *Caprice*, to carry it on to Bristol, for an agreed freight of £2467 11 10, which the plaintiffs paid, receiving from the owners of the cargo the full charter freight. The master also incurred an expense of about £100 in landing, warehousing, and reloading the guano at Rio:—*Held*, that the plaintiffs were entitled to recover from the defendants, under the suing and laboring clause, the expenses so incurred and the freight of the *Caprice*, notwithstanding there had been no abandonment. *Held*, also, that evidence was admissible to show that, by the usage amongst underwriters, the term "particular average" does not include expenses which are necessarily incurred in order to save the subject matter of insurance from a loss for which the insurers would have been liable, and that these are usually allowed under the name of "particular charges." *Held*, also, that the occasion upon which these particular charges were incurred being such as to be within the suing and laboring clause, the application of that clause was not excluded by the warranty against particular average. *Kidston v. Empire Insurance Co.*, Law Rep. 1 C. P. 535.

Proof of Conviction.—A conviction before a police magistrate can only be proved by the production of the record of the conviction, or an examined copy of it. *Hartley v. Hindmarsh*, Law Rep. 1 C. P. 553.

Damages—Fraudulent Misrepresentation.—In an action for fraudulent misrepresentation the plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's representations. Therefore, where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died:—*Held*, that the plaintiff was entitled to recover as damages the value of all the cows. Willes, J., said: "The defendant induced the plaintiff to buy the cow by representing that it was sound when he knew that it was not so, and that it might communicate the disease to any other cattle with which it might be placed. Was it not necessarily within the contempla-

tion of the parties that it might be placed with other cows? The plaintiff was induced, by the defendant's misrepresentation, to treat it in the ordinary way, and the illness and death of the other cows was the direct and natural consequence of his doing so." *Mullett v. Mason*, Law Rep. 1 C. P. 559.

Adjoining Land-owners—Right to Lateral Support.—The right of the owner of land to the lateral support of his neighbor's land is not an absolute right, and the infringement of it is not a cause of action, without appreciable damage. Therefore, where A dug a well near B's land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B's land, the land would still have sunk, but the damage to B would have been inappreciable:—*Held*, that B had no right of action against A. Erie, C. J., said: "There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land, and this though no actual damage may result. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house, the noise of which may be inconvenient, but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act." *Smith v. Thackerah*, Law Rep. 1 C. P. 564.

Carriers by Railway—Undue prejudice—Collection of parcels.—A collected parcels, and forwarded them by railway; the railway company refused to admit A's vans into their station after 6. 30 P. M., but admitted their own vans and those of B at a later hour with parcels, which they forwarded the same night. The time (6. 30 P. M.) fixed by the company, as that after which they would not receive goods to be forwarded the same night, was reasonable. The company in admitting their

own vans later acted *bona fide*, and not with the intention of gaining an undue advantage over other collecting carriers; they admitted B's vans in consequence of an injunction obtained by him. In two similar cases—*Garlon v. Bristol and Exeter Railway Company*, and *Bazendale v. South Western Railway Company*—injunctions had been granted by the Court to restrain those companies from admitting their own vans into their station with goods to be despatched the same night, at a later hour than those of other persons. On an application by A for a similar injunction against the present defendants:—*Held* (by Erle, C. J., and Montague Smith, J.), that, the exercise of this special jurisdiction by the Court being subject to no review, and depending in each instance on the special facts of the case, cases previously decided under it are not binding on the Court in the same manner that precedents in law are binding; that the injunction prayed would interfere with the transport of traffic, which it was the object of the legislature to facilitate; and that it ought not to be granted. *Held* (by Willes and Keating, JJ.), that the above cases were precedents binding on the Court, and also were rightly decided; and that the injunction ought to be granted.—*Palmer v. London and South Western Railway Co.*, Law Rep. 1 C. P. 588.

Tender under protest.—An offer to pay, under protest, the sum claimed is a good tender.—The defendant's attorneys wrote to the plaintiff's attorney, "if you insist upon being paid the amount demanded before satisfactory explanations have been given, our clerk will hand you a cheque this morning for the amount, but you must consider the payment as under protest, and our client will seek to recover back what is overpaid afterwards." In accordance with this letter, a cheque for the full amount claimed was tendered to the plaintiff's attorney, but he refused to receive it, unless the letter was withdrawn, or he was allowed to state in his receipt that he received it not under protest. Willes, J., remarked: "The question is one of general importance, whether a debtor tendering an amount which he is satisfied to pay rather than be sued for it, may guard himself against an admission that the claim is a just one, so

as to put himself in a position to take further proceedings to test the justice of the claim, by adding the words "under protest" to his tender, and tendering under protest. It is quite obvious that he may. I think that the protest imposes no conditions on the tender. The creditor has only to say, 'I take the money; protest as much as you please,' and neither party makes any admission." *Scott v. Uzbridge and Rickmansworth Railway Co.* Law Rep. 1 C. P. 596.

Contract, Construction of.—The plaintiffs contracted with the defendant to erect upon premises in his possession a steam-engine and machinery, the works being by the contract divided into ten different parts, and separate prices fixed upon each part, no time being fixed for payment. All the parts of the work were far advanced towards completion, and some of them were so nearly finished that the defendant had used them for the purposes of his business, but no one of them was absolutely complete, though a considerable portion of the necessary materials for that purpose was upon the building, when the whole premises, with the machinery and materials, were destroyed by an accidental fire:—*Held*, that the plaintiffs were not entitled to recover the whole of the contract price; but that, inasmuch as the machinery was to be fixed to the defendant's premises, so that the parts of it when and as fixed would become his property and be subject to his dominion, and the contract must be taken to involve an implied promise on the defendant's part to keep up the building, they were entitled to be paid, as upon an implied contract, the value of the work and materials actually done and provided by them under the agreement. *Appley v. Meyers*, Law Rep. 1 C. P. 615.

Shipping—Charter party—Substituted contract.—The defendants chartered two vessels of 300 tons each for a voyage from Ibraila to London with full cargoes of petroleum, at 84s. per ton. In consequence of their stores at Ibraila having been destroyed by fire, they were unable to furnish any oil; and the owners agreed to cancel the charter parties and to procure other cargoes upon the defendants guaranteeing each vessel "a sum of £900 gross freight home." The homeward cargoes

shipped under the substituted contract fell short of the guaranteed sum for each vessel by £343. One of the vessels arrived in safety; the other was lost:—*Held*, that the contract was broken at the moment of the shipment of the homeward cargo, and consequently that the owners were entitled to recover the deficiency in respect of each vessel, notwithstanding the loss of one. *Carr v. Wallackian Petroleum Company*, Law Rep. 1 C. P. 636.

Shipping—Deviation.—A charter party contained a clause that the ship should "with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct or on the way, proceed to E., and there load a full cargo of cotton." This the freighters bound themselves to ship. The ship deviated to C. and arrived at E. a few days later than she would have done if she had gone there direct. The ship had not been taken up for any particular cargo, and a small loss in freight was the only result of this delay. —In an action against the freighter for not loading a cargo:—*Held*, that the above clause was a stipulation, and not a condition precedent, and that the delay afforded no justification to the freighter for refusing to load a cargo; but that his remedy for any damage that had accrued by reason of the delay was by cross-action. *MacAndrew v. Chapple*, Law Rep. 1 C. P. 643.

Company—Authority of Directors.—A company was incorporated under 25 & 26 Vict. c. 89; the memorandum of association being signed by seven shareholders; no deed of association was filed and no other shares allotted. A. entered into an agreement to act as foreman of the "company's" works, which was signed by B. & C., two of the persons signing the memorandum of association, as "Chairman" and "Managing Director," respectively. In an action by A. against the company for work done under the agreement:—*Held*, that in the absence of evidence to the contrary, the jury were justified in presuming that B. & C. had authority to bind the company. *Totterdell v. Fareham Brick Co.*, Law Rep. 1 C. P. 674.

EXCHEQUER.

Trespass—Duty of Owner of Land.—One, who for his own purposes brings upon his

land, and collects and keeps there anything likely to do mischief if it escapes, is *prima facie* answerable for all the damage which is the natural consequence of its escape.—The defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land; mines under the site of the reservoir, and under part of the intervening land, had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed by the underground communication into the plaintiff's mines:—*Held*, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused. *Fletcher v. Rylands*, Law Rep. 1 Ex. 265.

Bankruptcy—Action for false representation.—To a declaration for a false representation, whereby the plaintiff was induced to pay £2000, and "sustained great loss, and became and was adjudicated bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant, except as to the claim in respect of the adjudication in bankruptcy, and the remainder of the personal damage alleged, pleaded that before action the plaintiff had been adjudicated bankrupt, that the loss sustained was a pecuniary loss, and that the right to sue for it passed to his assignees:—*Held*, that the only damage recoverable was a direct pecuniary loss, the right to sue for which passed to the assignees, and, therefore, that the plea was a good answer to the whole declaration, and might have been so pleaded. *Hodgson v. Sidney*, Law Rep. 1 Ex. 313.

Statute of Frauds.—In order to make a valid

note or memorandum of a contract for the sale of goods within the Statute of Frauds, s. 17, the names of the parties to the contract must appear upon the document as such parties.—Spooners, the purchaser from Vandenberg, of goods above the value of £10, signed a document in the following terms:—D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenberg, now lying at the Lyme Cobb, at 1s per foot:—*Held*, (in an action by Vandenberg) that Vandenberg's name not being mentioned as seller, the document was not a note or memorandum of the contract within the Statute of Frauds, s. 17. Bramwell, B., remarked: "Can the essentials of the contract be collected from this document by means of a fair construction or reasonable intendment? We have come to the conclusion that they cannot, inasmuch as the seller's name as seller is not mentioned in it, but occurs only as part of the description of the goods." *Vandenberg v. Spooner*, Law Rep. 1 Ex. 316.

[This decision seems rather doubtful. The words "purchased by Mr. Vandenberg" appear to indicate clearly enough that Vandenberg was the actual owner and vendor. Besides, there was evidence that after Spooner had signed the above memorandum, he wrote out what he alleged to be a copy of it, which was as follows: "Mr. J. Vandenberg agrees to sell to W. D. Spooner the several lots of marble purchased by him, &c."]

Sheriff.—A debtor, whose goods had been seized under a writ of *fi. fa.*, persuaded the officer executing the writ not to advertise the sale, and himself interfered to prevent the issue of the bills; on the day of sale his agent induced the officer to postpone it to a later hour, and on the officer's proceeding to sell, directed him to sell also for a writ that day lodged with him, and under which he could not otherwise have then sold. In the management of the sale the officer conducted himself negligently in not properly lotting the goods, and they consequently sold at an undervalue:—*Held*, that the above facts did not constitute the officer the agent of the execution debtor, so as to absolve the sheriff from liability for the officer's negligence in the conduct of the sale. *Wright v. Child*, Law Rep. 1 Ex. 358.

Permanent Alimony.—In allotting perma-

nent alimony the Court will take into consideration the circumstance that the husband is obliged, in order to earn his income, to live in a more expensive place than the wife, and when that is the case will not allow her the usual proportion of such income. (The husband in this case had to go to India. One-quarter was allowed, instead of one-third, the ordinary proportion.) *Louis v. Louis*, Law Rep. 1 P. & D. 230.

ADMIRALTY AND ECCLESIASTICAL.

Expenses incurred by Master.—A master, while at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in a sum of £10 to prosecute the men for perjury. He forfeited the £10 in order to return with the vessel to England:—*Held*, on a motion to review the report of the registrar in a suit for disbursements, 1st. That the master was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance of his duty to his owners in chastising the men. And, 2ndly, the Court allowed the £10 forfeit, as it was for the interest of his owners that the master should not be delayed in returning with the vessel. *The James Seddon*, Law Rep. 1 A. & E. 62.

Salvage—Contract to tow.—Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of year; but if an unexpected change of weather, or other unforeseen accidents occur, he is bound to adhere to the vessel, and to do all in his power to rescue her from danger; and he will be entitled to reasonable extra remuneration for the extra service. *The White Star*, Law Rep. 1 A. & E. 68.

Cause of Booty of War—Principles of Distribution.—In a cause of booty of war, the *onus probandi* lies upon the parties claiming as joint captors as against the actual captors. The Court of Admiralty had no jurisdiction with respect to booty—property captured on land by land forces exclusively—until the passing of 3 and 4 Vict. c. 65, the 22nd sec-

tion of which, enacting that the Court "shall proceed as in cases of prize of war," must be understood to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but merely that the ordinary course of proceeding in prize should be adopted. —All prize belongs absolutely to the Crown, which, for the last 150 years, has been in the habit of granting it to "the takers," who are of two classes, actual captors and joint or constructive captors. Joint captors are those who have assisted, or are taken to have assisted, the actual captors by conveying encouragement to them or intimidation to the enemy. The union of the joint captor with the actual captor under the command of the same officer alone constitutes the bond of association which the law recognises as a title to joint sharing. Community of enterprise does not constitute association, and is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture. Such co-operation as will confer a title to a joint share of prize is also strictly limited to encouragement to the friend and intimidation to the enemy. The distinctions between captures on land and captures at sea, tend to show that in considering joint capture of booty, a wider application that is recognised in prize cases, must be allowed to the term "co-operation;" concerted action on a vaster scale than is feasible at sea being indispensable to a campaign. The rule of sight, too, which prevails at sea, is inapplicable on land. The general rule for the distribution of booty, to be adhered to as far as possible, in accordance with naval prize decisions, is the rule of actual capture. In the case of an army consisting of several divisions, the line of distribution, in analogy to the rule of the naval service, and in conformity to military usage, will be drawn between division and division; that division to be regarded as the actual captor, any portion of which has captured the prize. The association entitling to joint sharing must be military and not political, and must be under the immediate command of the same commander. The co-operation which is necessary as a title to joint sharing, is a co-operation directly tending to produce the capture in question. What tends

to produce the capture cannot be once for all defined, but strict limits must be observed of time, place, and relation. Services rendered at a great distance from the place of capture, acts done long before the capture was contemplated, even though they affect the whole scene of operations, cannot be deemed such co-operation as will give a title to share in booty. Indirect services will be insufficient. To entitle the commander-in-chief to share in booty, he must himself be in the field; but "to be in the field," it is not necessary that he should be actually present with the division that makes the capture; being in the field with one division, he is in the field with all. But, if troops have been placed under the *DEPENDENT* command of another, the commander-in-chief, though actually in the field, does not share in booty taken by those troops. No distinction should be made in the right of the general and personal staff to share in booty; in principle, the right of both stands or falls with that of the commander-in-chief, therefore all his staff who are in the field with him are entitled to share. *Banda and Kinoo Booty*, Law Rep. 1 A. & E. 109.

[The report of the case in which the above principles were laid down by Dr. Lushington, fills 160 pages, the judgment alone occupying 140 pages. The case arose out of the military operations undertaken by the British Government in India, for the suppression of the mutiny in that country during the years 1857 and 1858. The evidence adduced consisted of six printed volumes, chiefly correspondence. The booty amounted to about £750,000, and was actually captured by the division under Major General Whitlock, but claims were preferred by the commander-in-chief, and generals commanding other divisions, on the ground that their forces cooperated in the movements of troops which led to the capture of the property. These claims were referred by an order in Council to the Judge of the High Court of Admiralty, Her Majesty having waived her right to the property, and having desired that it should be divided among the forces concerned in the operations. This was the first reference of the kind under the Statute, and our readers will find Dr. Lushington's elaborate judgment well worthy of perusal.]

The Lower Canada Law Journal.

VOL. II.

JUNE, 1867.

No. 12.

THE JUDICIARY OF LOWER CANADA.

The *U. C. Law Journal*, in noticing our reports of the *Ramsay Contempt Case*, takes occasion to make some rather severe reflections upon the Bench of Lower Canada. The purport of its article is, that such a case could hardly have occurred in the Upper Province, the Bench there being in the full enjoyment of the esteem and veneration of the Bar. The article concludes as follows :—

"For our part, indeed, we hope that this unpleasant episode respecting legal life in this Canada of ours may not be further agitated in the English courts, and that however interesting the points in dispute may be in themselves they may be considered settled as they now stand.

"That such a state of things as have resulted in the *cause célèbre* of *Ramsay*, plaintiff in error, v. *The Queen*, defendant in error, exhibits, could not well occur in this part of Canada, we may well be thankful for. That such a boast may be as true of the future as it has been of the past, should be the constant aim and exertion of all those, who, on the bench or at the bar, or in the study of the laws, desire the welfare of their country. The heritage left to us by those able, courteous and high-minded men who set the standard of the profession in Upper Canada cannot be too highly prized; and he who first, whether by his conduct on the bench or at the bar brings discredit upon their teaching, will, we doubt not, meet the universal contempt which such conduct would deserve.

"The bench of Lower Canada is not (with some honorable exceptions) what it ought to be. The conduct of Lower Canada judges has, on more than one occasion, caused Canadians to blush; and we regret to say that people abroad know no distinction between the bench of Upper and Lower Canada, and so in their ignorance cast up on the Bench of Canada, the

obloquy which appertains to that of the Lower Province alone."

Hard words need not cause us any concern unless they are true. The question then, is, are these things true?

We think that the majority of the gentlemen holding high judicial office in Lower Canada, will not compare unfavorably with the judges of Upper Canada or any other Province, but we must confess that there are exceptions, and it is these exceptions that have, unfortunately, brought discredit upon our Bench. The judges of England have obtained a wonderful repute for the calm and dispassionate discharge of their functions. Within the last two centuries they have become the pride and boast of the English people, and now it is a thing unheard of, for the faintest suspicion of partiality or prejudice to alight upon their decisions. In Upper Canada, the judges seem to be regarded with almost equal affection and reverence. Why cannot we say the same here?

Many of our readers will probably be able to answer this question quite satisfactorily for themselves, and in putting down the following observations, we are only expressing what is probably patent to all. In the first place, then, we believe that judges have sometimes been unfortunately selected from among men to whom the bench was not the scope of a noble aspiration, who did not regard the judicial office with the respect pertaining to it, who accepted it simply as a retreat from political uncertainties, or the inevitable incumbrance on the enjoyment of an official salary.

Secondly, men have been placed on the Bench, who were involved in pecuniary difficulties. A man may be perfectly honest and upright, though unable to meet his liabilities, but he is not so well qualified for an office of dignity. LORD ABINGER was so strongly impressed with the belief that easy circumstances are necessary to keep up the respectability of a barrister, that it is stated he at one time intended to propose a property qualification for members of the bar. £400 a year was, in his opinion, the smallest income on which a barrister should begin. How much more necessary that the judge, who is every day called upon to dispose of cases involving large

pecuniary interests, should have no fear of the bailiff in his house, of executions against his lands—should at least, if not endowed with worldly goods, be able to say that he owes no man anything! We feel bound to add here that our judges are not fairly treated with respect to remuneration. The judicial salaries, especially in the large cities, should at least be doubled, and the retiring pensions should be adjusted on a more liberal footing.

In the third place, men have sometimes been placed on the Bench who had no love for their profession, who lacked a sound judgment, who had not gone through the toil and study necessary to fit them for their high office, and whose private life was far from inspiring respect.

It may be expected by some that we should add to this list, the appointment of politicians. But, in our humble opinion, the appointment of lawyers who have been engaged in political affairs, cannot be condemned, if the record of their political career is fair and honorable, and if they have also been distinguished at the bar. It is but right and reasonable that lawyers of integrity and ability should seek to enter the Legislature, where their opportunities of usefulness are greater and more extended. The real difficulty is, that in Canada politics in the past have been too petty, too selfish, too full of personal animosities. Thus it may happen, that a hot politician of one party is appointed to the Bench, though personally obnoxious to members of the Bar of the opposite camp. We trust that under the new Dominion this will cease to be the case. There is now no excuse for improper appointments, for we have at the bar no lack of men of great attainments, eminently worthy of the judicial seat, and enjoying the esteem and confidence of the bar and the public generally.

We must repeat, in conclusion, that the majority of our judges are not deficient in ability, learning or integrity. No charge of corruption has been made against any of them, and in this respect we are infinitely better off than our American neighbors with their elective judiciary. It may confidently be anticipated that the exceptional cases which have caused a loss of dignity to the Bench, will gradually be eliminated. The community in

general and the bar will therefore watch with peculiar interest the appointments soon to be made, for on them will it greatly depend whether the Bench in the Province of Quebec is to assume its proper position.

THE BRITISH NORTH AMERICA ACT.

We have received the authorized text of Cap. III, of the present session of the Imperial Parliament: "An Act for the Union of *Canada, Nova Scotia, and New Brunswick*, "and the Government thereof; and for purposes connected therewith," which became law on the 29th of March last. We regret that our space will not permit us to give entire this important measure, which, in the words of Mr. McGEE, is to be "the last interference of England in our domestic affairs." The following are some of the provisions more directly affecting Lower Canada, and the Judicature.

5. *Canada* shall be divided into four Provinces, named *Ontario, Quebec, Nova Scotia, and New Brunswick*.

6. The parts of the Province of *Canada* (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of *Upper Canada* and *Lower Canada* shall be deemed to be severed, and shall form two separate Provinces. The Part which formerly constituted the Province of *Upper Canada* shall constitute the Province of *Ontario*; and the Part which formerly constituted the Province of *Lower Canada* shall constitute the Province of *Quebec*.

11. There shall be a Council to aid and advise in the Government of *Canada*, to be styled the Queen's Privy Council for *Canada*; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

16. Until the Queen otherwise directs, the seat of Government of *Canada* shall be *Ottawa*.

17. There shall be One Parliament for *Canada*, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

71. There shall be a Legislature for *Quebec* consisting of the Lieutenant Governor and of two Houses, styled the Legislative Council of *Quebec* and the Legislative Assembly of *Quebec*.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in *Nova Scotia* and *New Brunswick*.

98. The Judges of the Courts of *Quebec* shall be selected from the Bar of that Province.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in *Nova Scotia* and *New Brunswick*), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of *Canada*.

101. The Parliament of *Canada* may, notwithstanding anything in this Act from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for *Canada*, and for the Establishment of any additional Courts for the better Administration of the Laws of *Canada*.

129. Except as otherwise provided by this Act, all Laws in force in *Canada*, *Nova Scotia*, or *New Brunswick* at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick* respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of *Great Britain*, or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*) to be repealed, abolished, or altered by the Parliament of *Canada*, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

RAMSAY v. REGINA.

To the Editor of the Lower Canada Law Journal:

Sir,—I presume it was from the same source you learned that the statement made respecting *Driscoll's* case in my argument on the 6th March was totally unfounded, and this piece of secret history, that "if he (Chief Justice Rolland) was not present on every occasion, the sole reason was that he feared to be subjected to fresh insult." The impression the report conveys to the reader will depend a good deal on the reader's intelligence, but the point plainly made by me was that in the *Driscoll* case, Mr. Justice Rolland took no part in the proceedings. It was never said that he was not on the Bench when the rule issued; but what I said was this, that Mr. Justice Rolland was not on the Bench on the 28th March, when Mr. Justice Aylwin read the famous paper beginning, "The marked misbehaviour of the person who represents the attorney-general &c.," and on the 11th of April when the rule was taken he was on the Bench, but far from presiding as you say, he took no part in the matter, and the rule, which I believe was in Mr. Justice Aylwin's own handwriting, was read by him. As for the reason given for the non-appearance of Chief Justice Rolland on the 28th, I do not believe it. Had he had any such fear it would have operated as strongly on the 11th April as on the 28th March, but to attribute to a childish fear, the forbearance which was evidently dictated by a sense of honour and regard for the judicial oath, is a slander on the memory of an upright and honorable man. Apart from any question of law, no man with the faintest sense of honour or decency would consent to sit as a sworn judge when he could be supposed to have a bias. And so the late Mr. Justice Mondelet would not sit in the Seigneurial Court because he was the owner of Seigneurial property, yet in that case there was no party interested, the matters to be decided being simply abstract questions of law.

I see you also support it as *probable* that dread of further insult prevented Mr. Justice Crosby from sitting in the *McDermott* case, and you add, "that there is no ground for

supposing that Mr. Justice Crosby deemed himself incompetent." There can be no better ground for such a supposition than the general rule which lays down that no man shall be a judge in his own case. It would be more conclusive for the theme which you seem desirous to support, if you could find a case where a man had sat in his own case. It might perhaps be some answer to the general principle, which seems to be based on the laws of morality, and to the case of the King v Lee, 12 Mod., p. 514, cited by me, which no one has attempted, so far as I know, to answer. The judges of the Court of Queen's Bench, and a certain class of politicians, may twist and turn the matter as they will, but they will never get unprejudiced people to believe, whatever they may think of the abstract merits of the case, that Mr. Drummond was morally justifiable in taking up in the Court where he sat alone a pretended contempt which, if a contempt at all, was a contempt of the whole Court, and which the whole Court for an entire term refused to notice. He may protest that he was not avenging from a place of safety a personal affront; but his protestations will make no converts.

Your obdt. servt.,

T. K. RAMSAY.

Montreal, 12th May 1867.

[It seems to us that the material point is whether Mr. Justice ROLLAND abstained from taking an active part in the proceedings against Mr. DRISCOLL, because he deemed himself incompetent. If it was illegal for him to take an active part, was it not equally illegal to sit when the rule issued? We have the best authority for stating that Mr. Justice AYLIWIN would not have dealt with the case, unless Mr. Justice ROLLAND had consented to take part, and we see nothing slanderous in supposing that Judge ROLLAND wished to have as little as possible to do with a disagreeable matter. We are far however from advocating the propriety or expediency of the Judge, against whom a contempt has been specially directed, disposing of it alone, whenever such a course can possibly be avoided. On the contrary, we have all along

inclined to the opinion that in the present case it was incumbent on the Court of Queen's Bench, which met on the 1st of September last, to take notice of the letters complained of. If the majority of the judges had been averse to taking any steps, then, in our humble opinion, it would have been better to have let the matter rest. In the recent remarkable case in Nova Scotia (which we hope to be able to give next month), where Mr. WALLACE, a barrister, wrote an insulting letter to the CHIEF JUSTICE of the Supreme Court, the judgment suspending Mr. WALLACE was pronounced by the CHIEF JUSTICE himself who, however prefaced his judgment with the words: "The judgment I am about to pronounce is to be taken as the judgment of the whole Court," (Law Rep. 1 P.C. 287.) But while admitting that it is more *becoming*, where an individual judge has been insulted, that he should not move in the matter alone, we have seen nothing to show that such a course is illegal, and it appears to us in some instances (as where a judge is alone in a rural district) almost unavoidable. Ed. L. J.]

THE LOWER CANADA REPORTS.

The issue of the *Lower Canada Reports* has been suspended since December last, and it is stated on good authority, (though we have seen no official intimation of the fact,) that it will not be resumed. This series of reports was authorized by an Act of the Provincial Legislature, under which a tax of \$5 per annum was imposed on members of the bar and various legal functionaries for its support. At this time no citable reports were published in Lower Canada, and the want of them was greatly felt and deplored. The tax, however, did not prove very popular, and has not been collected for several years back. Of late years the cost of preparing and editing the reports has been almost entirely defrayed out of the public monies, the Public Accounts showing that over \$2,500 per annum has been paid for this purpose to M. Lelièvre, the late editor. The L. C. Reports comprise sixteen volumes, and contain the valuable reports prepared by one of the most eminent practitioners in Canada, A. ROBERTSON, Esq., Q. C., one of the Montreal collaborators.

BANKRUPTCY—ASSIGNMENTS.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Anderson, M. & E.	London	L. Lawrason	London	May 1st.
Arthur, William	Goderich	S. Pollock	Goderich	April 16th.
Barette, Louis	St. Rémi	A. B. Stewart	Montreal	May 13th.
Battle, Matthew	St. Catharines	Alph. S. St. John	St. Catharines	May 1st.
Beaudette, J. C., & Co.	Plessisville de Somerset	F. Sauvageau	Montreal	May 19th.
Belcourt, Ferdinand Napoléon	Ottawa	Francis Clemow	Ottawa	May 21st.
Bradford, Arthur Nelson, individually and as partner of Bradford & Mercier	Upton	F. Sauvageau	Montreal	May 2nd.
Brown, Johnston	Ottawa	Francis Clemow	Ottawa	April 30th.
Carson, Robert W.	Clarke	E. A. Macnachten	Cobourg	April 27th.
Casby, Gilbert S.	Napanee	W. S. Robinson	Napanee	April 18th.
Connell, James, Adam, and John	Hamilton	W. F. Findlay	Hamilton	April 29th.
Conway, William	Napanee	W. S. Robinson	Napanee	April 22nd.
Cornell, John	Hespeler	H. F. J. Jackson	Berlin, C. W.	April 29th.
Cornick, Samuel	Dunville	Geo. B. Magee	Dunnville	April 19th.
Cusson, Alfred, individually and as partner of Cusson & Vincent, Cusson, Normand & Vincent, and Cusson & Normand	Longueuil, C. E.	John Whyte	Montreal	April 30th.
Dewberry, Isaac	Township of Mono	Wm. Parsons	Orangeville	May 9th.
Doleau, Samuel G.	St. Catharines	Robert Fowle	St. Catharines	April 15th.
Drake, James W.	Walkerton	W. Collins	Walkerton	April 16th.
Flindall, Peter James	Trenton, C. W.	A. B. Stewart	Montreal	April 18th.
Forcier, Toussaint	Roxton Pond, C. E.	T. Sauvageau	Montreal	May 10th.
Gagnon, Pierre	Montreal	T. Sauvageau	Montreal	May 15th.
Galbraith, Robert Alexander	Simcoe	A. J. Donly	Simcoe	April 29th.
Gallon, James	Lindsay	S. C. Wood	Lindsay, C. W.	May 7th.
Gamble, John William	Walkerton	W. Collins	Walkerton	May 15th.
Gavreau, Joseph	Montreal	John Whyte	Montreal	April 20th.
Good, Thomas	Colborne	John Holdan	Goderich	May 11th.
Green, Eli Owen	London	Thos. Churcher	London	April 29th.
Green, George	Wingham	S. Pollock	Goderich	May 18th.
Hall, William	Toronto	W. T. Mason	Toronto	April 27th.
Hamilton, Alexander	Toronto	John Kerr	Toronto	April 22nd.
Hazen, Henry Wilkinson	Simcoe	A. J. Donly	Simcoe	May 6th.
Henderson, William	Toronto	Thomas Clarkson	Toronto	May 1st.
Hilley, Edward Scager	Simcoe	A. J. Donly	Simcoe	May 21st.
Howard, William	Toronto	Thomas Clarkson	Toronto	April 24th.
Hutty, Peter	Toronto	Thomas Clarkson	Toronto	May 6th.
Jondro, William, individually and as member of firm of Wilkey & Jondro	Stanstead	Stephen Foster	Stanstead	May 2nd.
Kilar, Francis	Woodstock	Jas. McWhirter	Woodstock	May 6th.
Kavanagh, Michael	Ottawa	Francis Clemow	Ottawa	April 29th.
Lalonde, Stephen	St. Anicet	T. Sauvageau	Montreal	May 17th.
Lamprey, Brook Young	Guelph	E. Newton	Guelph	April 20th.
Langelier, Antoine	St. John, C. E.	T. Sauvageau	Montreal	April 30th.
Lafrenouille, Denis	St. Jean Chrysostôme	F. S. Brown	Montreal	May 22nd.
Lee, William	Compton	A. M. Smith	Sherbrooke	April 17th.
Lester, Henry	Hamilton	W. F. Findlay	Hamilton	April 25th.
Lindsay, William	Lindsay	S. C. Wood	Lindsay	April 29th.
Lynn, William	Sherbrooke	A. M. Smith	Sherbrooke	May 1st.
McBride, William and John	London	Thos. Churcher	London	April 23rd.
McCallough, John Robert	Township of Darlington	Philip Potter	Tp. Darlington	April 23rd.
McDiarmid, Peter	St. Thomas, C. W.	J. Ardagh Roe	St. Thomas	May 20th.
Macdonnell & McPhaul	Cornwall	John Whyte	Montreal	April 29th.
Macotte, Lafe and Thomas Poupore	Tp. of Allumette Island	Francis Clemow	Ottawa	April 13th.
Moffat, William	Pembroke	Thos. Deacon	Pembroke	May 18th.
Morrison, W. C.	Toronto	Thomas Clarkson	Toronto	May 11th.
Nulty, M., & Sons	Belleville	Geo. D. Dickson	Belleville	May 9th.
Paquette, Salveny	Wrentham, C. E.	T. Sauvageau	Montreal	May 4th.
Pridham, Richard	Wrentham	T. S. Brown	Montreal	April 25th.
Rickett, Arthur Henry	Woodstock	Jas. McWhirter	Woodstock	May 21st.
Ridd, Nathaniel	London	Thos. Churcher	London	April 20th.
Reeve, Sarah	Toronto	Thomas Clarkson	Toronto	May 7th.
Second, Solomon	St. Catharines	Absalom Foster	St. Catharines	April 20th.
Shaw, Levi Allan	Simcoe	A. J. Donly	Simcoe	April 30th.
Spring, James	London	L. Lawrason	London	May 15th.
Sweetman, William	Napanee	W. S. Robinson	Napanee	May 17th.
Taggart, John	London	Thos. Churcher	London	April 15th.
Teeter, Conrad	Grimsby	P. B. Nelles	Grimsby	May 2nd.
Wardlaw, John	Woodstock	Jas. McWhirter	Woodstock	May 15th.
Wilson, William	Township of Wallace	Thos. Miller	Stratford	May 1st.
Wilson John	Township of Feneelon	S. C. Wood	Lindsay	April 29th.

AGREEING TO DISAGREE.

In the case of *White v Calder*, at New York, recently, the Jury came into Court and stated that they "had agreed to disagree." The Judge refused to receive this statement and sent them back. This was subsequently made a ground of exception in the Court of Appeals, but Chief Justice DAVIES held that it is not error for the judge to refuse to discharge the jury until they have agreed upon their verdict: whether or not to discharge them being a matter for his discretion. It is stated that in a former case, in the Superior Court, the Jury told Mr. Justice BARBOUR in the morning that they had agreed to disagree, and consequently had separated during the night! The Judge administered a reprimand, emphasized by a fine of \$500 each, and the suspension of the officer who had allowed them to separate.

THE COURT OF REVISION AT MONTREAL.

In consequence of the delay in filling up the vacancy occasioned by the appointment of Mr. Justice BADGLEY to the Court of Appeals, and the indisposition of Mr. Justice SMITH, the sittings of the Court of Revision have now been suspended since December last, with the exception of two days, when Mr. Justice LORANGER came to town for the purpose of completing the Bench. A large number of cases have thus been locked up and delayed for many months, and the members of the bar residing in the country districts put to serious inconvenience, in making useless journeys to town to attend the sittings.

EVENLY MATCHED.—In the cause list of one of the New York Courts, on May 4th, appears the case of *Quirk v Wyke*. Surely these gentlemen conduct their suit in person.

—The *Pall Mall Gazette* says that one at least of the judges systematically refuses to add to the sentence of death, "May the Lord have mercy on your soul."

—Our notice of the retirement of Mr. Justice AYLWIN is deferred till next month.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

* APPEAL SIDE.

Dec. 7, 1866.

EASTERN TOWNSHIPS BANK (plaintiffs in the Court below), Appellants; and **PACAUD** (hypothecary creditor opposing in the Court below), Respondent.

Practice—Privilege for Costs.

Held, that a chirographary creditor bringing lands to sale is entitled to be collocated by privilege for costs, as in an *ex parte* action without *enquête*.

Held, also, that the Court of Review, in revising a judgment homologating a report of distribution, cannot order a larger sum to be paid over to an opposant than that awarded to him in the original report, until he shall first have been collocated for said larger sum in a report of distribution duly published.

This was an appeal from a judgment of the Court of Review at Montreal, on the 30th of November, 1864, modifying a judgment of the Superior Court at Sherbrooke, rendered on the 28th of September, 1864. The judgment at Sherbrooke homologated a report of distribution of moneys levied on the lands of the defendants by the plaintiffs, who had obtained judgment on a promissory note. The respondent, a hypothecary creditor, inscribed the case for review at Montreal, and the Court of Review rendered a judgment to the effect that the plaintiffs had no right to be paid their costs of action as privileged costs of distribution. From this judgment the plaintiffs brought the present appeal. The principal grounds of appeal were as follows:—

1. Because the judges sitting in review at Montreal by their judgment at one and the same time made and homologated a new report of distribution, and thereby prevented any party desirous of so doing, from contesting the same, or any collocation therein contained.

2. Because in and by the report of distribution contained in said judgment complained of, the said appellants are not allowed any costs whatever of suit in their action in said Superior Court, though said costs were necessary in order to bring the lands of defendants in said suit to sale, and inured to the benefit of all creditors.

3. The Court of Review had adjudicated upon the rights of third parties not before the Court, and particularly upon the claims of the heirs Gregory, who were creditors for the purchase money of the land in question.

For the respondent it was contended that the judgment of the Court of Review was in accordance with law, and that if it were the custom in the District of Sherbrooke to give a chirographary creditor costs of suit, such custom was an abuse, and should be abolished.

BADGLEY, J. I differ from my colleagues in this case which raises a question of procedure more than anything else. The respondent, a hypothecary creditor and opposant in the Court below, and the appellants, are the only parties in the record, the defendants having made default to appear, and the heirs Gregory not being at any time represented in the case. By the original judgment, the plaintiffs were allowed a considerable amount of costs, as their privileged costs of obtaining judgment and bringing the lands of the defendants to sale. The respondent took the case before the Court of Review, and there the judgment was modified, and the plaintiffs' claim for costs was reduced to costs subsequent to judgment. The heirs Gregory are not parties to this appeal, and must therefore presumably be supposed to have acquiesced in the final judgment of the Superior Court as revised by the Superior Court sitting in review. It is not within the province of this Court to raise objections in the interest of third parties. The appeal is limited to the judgment in review, and the plaintiffs, in urging their own interests, cannot go beyond the legality or illegality of that judgment. It is only with reference to the costs awarded to them that the appellants have any right to complain of the judgment. They claim the costs of an *ex parte* action, besides the costs of execution. But it must be remembered that they are only chirographary creditors, and the practice has long been established in Montreal, that where the claim is not privileged, the costs are not so against a hypothecary creditor. *Lalande v. Rowley*, (1 L. C. Jurist, 274.) The practice at Quebec it appears has of late been different, but I think it would have been proper so let the practice continue here as it has

been, till the Code of Procedure comes into force and renders the practice uniform. I have therefore to dissent from the judgment about to be rendered.

MEREDITH, J. This case raises two points, first, as to the amount of costs to be awarded to chirographary creditors bringing real estate to sale; and, secondly, as to the course to be pursued by this Court or the Revision Court, in setting aside a report of distribution. There is no doubt that as to the first point different opinions have obtained. The practice here was simply to allow the costs of the fiat for execution, whereas the practice at Quebec has been to allow also the costs of an *ex parte* action. In this case a chirographary creditor brought real estate to sale. This could not be done without first obtaining judgment, and in doing so a certain amount of costs was necessarily incurred. I think the costs of suit awarded in such case should always be confined to the costs of an *ex parte* action; for even if the action has been contested, it does not follow that, if a hypothecary creditor had sued, his claim would have been contested. And there is the same ground for not allowing the costs of an *enquête*, because no *enquête* would have been necessary for a chirographary claim. This is the rule laid down in the Code of Civil Procedure which will soon be in force, and the present case comes from the District of St. Francis where that practice has always obtained. Therefore we allow to the plaintiffs as chirographary creditors bringing real estate to sale the costs of an *ex parte* judgment. We come now to the second point, what is the course to be pursued by this Court when it becomes necessary to set aside a judgment of distribution? Here, I may say that our judgment is that which we think should have been rendered by the Court of Revision. How does the case stand? The respondent, Pacaud, was collocated for a certain amount, afterwards the Court of Review increased the amount collocated to him, but instead of ordering a new report, they ordered the money to be paid to him at once. This is what we think objectionable. Surely, the plaintiffs had a right to contest this award. Suppose they had a *quittance* in their possession. What

we say is this, that the respondent's claim may be good or it may be bad, but in any case it should have stood before the Court a certain time. I say nothing here about the heirs Gregory. I confine my judgment to the two points, the plaintiffs' privileged costs, and the money disappearing before them without their being allowed to say anything about it. We say, let the respondent's claim be collocated in due course of law.

POLETTE, J., sat in this case, but not being able to attend at the rendering of judgment, his opinion, concurring with the majority, was read by the Clerk of the Court.

AYLWIN, J. I entirely concur in what has been stated by the Chief Justice (Meredith) and also in the able opinion of His Honor Mr. Justice Polette.

DRUMMOND, J., also concurred.

The judgment was recorded as follows: The Court...considering that the real estate, the proceeds of the sale of which are now before the Court, was brought to sale at the instance, and at the costs and charges of the appellants, and that the said appellants were and are entitled to be collocated by privilege for their said costs, as in an *ex parte* case without *enquete*, and therefore that in the judgment now appealed from, in which the appellants are not collocated for their said privileged costs, there is error; and seeing also that by the said judgment the said respondent is ordered to be paid the sum of \$405.30, without his having been previously collocated for the said sum, in a report of distribution made and published, so as to afford to the said appellants, and other parties interested, an opportunity of contesting the claim of the said respondent for the said last mentioned sum of money, and that in this respect also the said judgment is erroneous, doth in consequence reverse the said judgment, to wit, the judgment rendered by the Superior Court sitting in review at Montreal, on the 30th of November, 1864; and this Court proceeding to render the judgment which the Court below should have rendered in the premises, doth order the record in this cause to be remitted to the Superior Court at Sherbrooke, in order that a report of distribution of the moneys levied in this cause may be made and

published in due course of law, and that such further proceedings may be had in the premises as to law and justice may appertain, and this Court doth condemn the respondent to pay to the appellants their costs, as well in this Court as in the Court of Revision, and it is lastly ordered that the record be remitted to the Court below.

Samborn & Brooks, for the Appellants.

E. L. Pacaud, for the Respondent.

March 7, 1867

SAMUELS, (plaintiff in the Court below,) Appellant; and RODIER, (defendant in the Court below,) Respondent.

Lease—Injury to premises by fire—Action by Tenant to be reinstated.

Where a fire, occurring during the lease, renders the premises leased temporarily uninhabitable, but does not totally destroy them, the tenant is entitled to hold possession, and to resume occupation of the premises as soon as repaired.

A tenant, who is bound by the lease to make all repairs himself, is not bound to repair the premises if seriously damaged by an accidental fire.

This was an appeal from a judgment of the Superior Court rendered by *Monk, J.*, on the 20th of September, 1865, dismissing the plaintiff's action with costs.

The action was instituted by the plaintiff, under the Lessor and Lessee's Act, to compel the defendant to restore to the plaintiff possession of a shop and dwelling in Notre Dame Street, Montreal, which the plaintiff had leased from the defendant for five years from the 1st of May, 1861, and of which leased premises, the respondent had illegally resumed possession more than a year before the expiration of the lease. The plaintiff also claimed £150 damages.

To this action the defendant pleaded, 1. An offer on the part of plaintiff to give up the leased premises. 2. That on the night of the 24th of February, 1865, a fire broke out in the interior of the building leased, causing so much damage that the plaintiff left it, and the defendant at once took possession for the purpose of repairing the premises. That the destruction of the shop and dwelling was so

nearly complete as to put an end to the lease, especially as the defendant wished to enlarge, improve, and rebuild the shop and dwelling, so as to receive a higher rent therefor. 3. That the plaintiff had not taken due care of the leased premises, but some time before the fire had negligently suffered them to be inundated with water. That the fire took place through the fault of the plaintiff, or of some one in his employ, and destroyed so much of the interior of the building as to render it untenable. That plaintiff was a careless tenant, and the circumstances of the fire were such that the Insurance Companies refused to insure the premises anew if the plaintiff remained in possession.

The action was dismissed in the Court below, Mr. Justice *Monk* being of opinion that the plaintiff had failed to establish his case, and particularly that he had not proved that the defendant took possession of the leased premises by force or against plaintiff's will; and further, that under the circumstances the defendant was justified in taking possession of the premises. From this judgment the plaintiff appealed.

ATLWIN, J. I have to differ from the majority in this case. The evidence of *Teulon*, bookkeeper of *Sadlier & Co.*, shows that in November preceding the fire, part of the stock of *Sadlier & Co.* was damaged by water coming from the upper story of the plaintiff's dwelling. *Teulon* went to the plaintiff's store and asked him to pay for the damage, but the plaintiff answered that he was sorry, but it was not in his power to offer compensation; that since he had been in that shop he had been losing money. *Teulon* looked round his store, but did not consider that it was worth while taking proceedings, as the stock did not appear of sufficient value. The declaration does not say one word about the fire. The plaintiff merely alleges that he had been violently dispossessed of the premises, and claims to be put in possession. There is not a word about repairs being required. It is only by a special answer that the plaintiff alleges that the fire was accidental; that the defendant refused to repair the building, and took possession when the plaintiff temporarily quitted it. This special answer is a complete

departure from pleading. It contains allegations which should have been made in the declaration. It should therefore have been set aside. No attempt has been made on the part of the appellant to prove in what way the fire occurred. I am of opinion that even if the declaration had been properly drawn, the judgment should have been confirmed on the evidence.

MONDELET, J. I am always disposed to confirm when it is possible to do so, but here I think the reasons of appeal are sufficient to reverse the judgment of the Court below. *Samuels* is proved to be an honest, industrious man. It cannot be doubted for one moment that the premises became uninhabitable in consequence of the fire, and although *Samuels* by his lease was bound to make repairs, yet this stipulation in the lease could not be made to refer to the repair of the house after a fire. The damages, however, will be restricted to £50.

BADGLEY, J. The facts of this case are as follows: *Samuels* leased the premises, a shop with dwelling above, from *Rodier*, for five years. He took possession and continued his tenancy until the 27th of February, 1865. On the night of the 24th—25th February, 1865, a fire occurred in the shop, which injured it very much, and prevented the defendant's use of it until repaired. The same fire extended to the dwelling above, which was not much injured in itself, except that the windows were broken, a circumstance not conducive to a tenant's comfort during the winter month of February. During his tenancy the defendant laid out \$300 in improvements, and during all that time the landlord carefully abstained from breaking the conditions of the lease which specially relieved him from making any repairs. On the 25th of February, *Samuels* closed the shop entrances, and the stock in the shop, and the household furniture in the dwelling above, remained there until the 29th, when the insurance survey was held. The result of the survey was the payment to *Samuels* of his insurance, \$1000, whilst the landlord secured indemnity to the extent of \$600 for damages suffered, including of course in the estimate the injured improvements effected by *Samuels*.

The landlord took possession of the premises for the purpose of repairing them, and those repairs might have taken four or five weeks. He held the premises from the day after the fire, and at once took precautions as a prudent man to improve his position. His insurance indemnity secured him against any possible loss, but the opportunity was taken to increase his rent. Samuels was to pay £100 per annum during his lease, which wanted fourteen months to complete from the date of the fire. So on the first of March the landlord leased these premises as they were to the neighboring booksellers, Sadlier & Co., for \$100 additional to Samuels' rent, and obliged Sadlier to make the repairs if Samuels should require them. This being satisfactorily settled, having received, on the 15th March, a protest and demand from Samuels to repair and give him up the premises, the landlord on the next day, the 16th, returns the complimentary protest by another, in which he distinctly informs his tenant of his intention to retain absolute possession, and to exclude him altogether.

In this state of things Samuels' action is brought for possession of the premises as they were when this adverse possession was taken, on the 27th of February. The plea has set out several facts: First, the plaintiff's offer to give up the premises to the landlord. This has not been proved. Second, that the premises were so much injured by the fire that the defendant took possession to repair. Third, that the destruction of the shop and dwelling was so nearly complete as to put an end to the lease. This has not been supported by proof. Fourth, defendant's wish to enlarge the premises. This is disproved by his own acts. Fifth, that plaintiff was a careless tenant, and reference has been made to injury caused by water in the November previous. But the defendant never took any steps to remove his tenant, and personally made no complaint. All the objections pleaded fail of being substantiated except one: that the defendant took possession of the injured premises *for the purpose of repairs*. The action is in forcible dispossession and ouster, and prays to recover possession of the premises as when they were taken by the

landlord. The answer of the defendant is, yes, I did take possession, but I did so for the purpose of repairing them. He then exhibited his purpose and intent by at once leasing them to Sadlier, over Samuels' head, giving Sadlier immediate possession, and a few days after notifying Samuels that he should not re-enter. The plaintiff replies that his abandonment was temporary, that the repairs might be made by the defendant; that the defendant retained wrongful possession, there being fourteen months of the lease to run. The state of the premises was that the stock in the shop was much injured, the large show window, and doors back and front broken, the shelving, counter and drawers injured, the dwelling partially injured in the rear, part of the floor on the underside scorched, and the windows all broken; the walls all remained good, as well as the partitions and ceilings. This condition of premises is what the defendant calls the nearly complete destruction of the shop and dwelling by fire, whereby the lease was ended. It does seem quite clear that this did not constitute a destruction absolute, or an approximate destruction, or any but a very partial injury, which could have been repaired as proved in three or four weeks, and which the defendant by his plea declared it to be his intention to effect. It is true that by the lease the plaintiff was to make all repairs, but this clause surely did not extend beyond what the parties contemplated at the time. They did not contemplate the occurrence of a fire, for in such case the tenant would have been bound to rebuild and re-instate the entire premises, if entirely destroyed. If they did not contemplate this extreme, neither did they the partial loss by fire. The lease shows that the parties contemplated the use and enjoyment of the premises during the period of the lease, during which occupation and enjoyment the tenant was to keep them in order, and if he needed changes or improvements he was to make them himself. It is manifest that there was no such damage as to break the lease, and no such absolute abandonment as to justify the defendant's after determination to possess adversely.

Neither the facts nor law in this case are

intricate or difficult, and the remaining points may be briefly disposed of. Pothier, Louage, No. 194, says that ordinarily "les incendies arrivent par la faute des personnes qui demeurent dans les maisons." When a fire occurs, it is "facilement présumé arrivé par la faute du locataire." This may be taken as true, because if a fire occurs in an occupied house, it can only occur by the negligence or wickedness of the occupants. But Pothier is careful to make his authority or dictum rest upon a presumption, a strong one certainly, but still only a presumption. *Il est facilement présumé*, but in the next line he shows in plain language how this presumption is liable to be set aside: *à moins qu'il ne justifie que l'incendie est arrivé par un cas fortuit.* The testimony in the case clearly establishes the accidental nature of the fire. Notwithstanding the insinuations of defendant's witnesses, the presumption against the plaintiff has been clearly rebutted.

With these explanations, the question turns upon the loss suffered by the tenant. His lease had fourteen months to run; out of this must be taken the time required for repairs, say one month. What, then, are his damages, and how does he establish them? A number of the most respectable tradespeople in the city have given their testimony in Samuel's favor. They base their calculations of damage upon the supposed results of the defendant's business. They state that he maintained his family and kept up his establishment respectably; and that £250 per annum must have been required to do this. His insurance for stock was \$1000, but the value may not have been fully covered. I have had great doubts upon this part of the case; none upon the injustice of the landlord's conduct. Looking at the whole case, the increased rent obtained for the premises for the fourteen months to run, and the plaintiff being kept out of business for want of his premises for that time, I am disposed to concur in reversing the judgment, and allowing the defendant £50 damages, with costs.

DRUMMOND, J. I think the charge made against the plaintiff, of having lighted the fires of destruction in the heart of a sleeping city, is one of those accusations which can-

not be too severely censured if unsupported by proof. The fact is that the plaintiff had great difficulty in saving his own life, and his family had to be got out of the second story window. The retention of the premises by the defendant was just as much a forcible dispossession, as if while a man is away at the seaside with his family, some one enters his empty house in the city, and refuses to give up possession. As Mr. Justice Badgley has remarked, the action is what in England would be called an *ouster*. The only difficulty is as to the amount of damages. I would have been disposed to give £150, but in order that a judgment may be rendered in plaintiff's favor, I concur in the judgment giving him £50.

The judgment was *motiô* as follows:

Considering that by a notarial deed bearing date the 25th of February, 1861, the respondent leased to the appellant for five years from 1st May, 1861, to 1st May, 1866, a shop and dwelling house in Notre Dame Street, Montreal, in which the appellant continued to reside and to carry on business as a hatter and furrier until the said premises were injured, and rendered for a time uninhabitable by a fire which occurred therein on the night of the 24th—25th of February, 1865, viz. fourteen months and three days before the expiration of the said lease:

Considering that it is to be inferred from the evidence that the said fire was accidental, and that it is not proved that it was caused either by the act or neglect of the appellant, or of any person in his employ, or residing on the said premises:

Considering that inasmuch as the said fire did not totally the said premises, but merely injured them so as to render them temporarily untenable, the said appellant still continued to be in the legal possession thereof after the said fire, and left them after having carefully closed them up, with the intention of returning thereto and continuing his business therein, so soon as the respondent had restored them to an equally tenantable condition as they were in on the eve of the said fire, as the respondent was bound by law to do, and could have done within the space of three weeks or thereabouts:

Considering that the respondent within four days from the occurrence of the said fire, viz. on the 1st of March, 1865, without the appellant's permission or consent, illegally took possession of the said premises and leased them, with a certain store adjoining, for nine years from the 1st of May, 1865, to Messrs. Sadlier & Co., for a rent increased by \$100 a year, although he, the respondent, admitted by the said lease that the appellant might claim the right of occupying the premises so leased to him as aforesaid until the 1st of May 1866:

Considering that the appellant on the 15th of March, 1865, duly notified the respondent to repair the said premises in order that he, the appellant, might continue his occupation thereof until the expiration of his lease, and that the said respondent informed the said appellant on the next following day that he the respondent had taken possession thereof, and intended thenceforth to withhold them from the appellant:

Considering for all these reasons that the appellant was, at the time of the institution of his action, entitled to be reinstated in possession of the said premises for the remainder of the term of his lease, that the said term having expired during the pendency of his suit, he is entitled to claim damages of and from the respondent for the injury by him sustained through the illegal withholding from him of the said premises by the respondent as aforesaid, and that the appellant had adduced sufficient evidence to enable the Court below to assess such damages:

Considering therefore, that in the judgment of the Superior Court there is error, &c. Judgment reversed, and respondent condemned to pay \$200 damages, with costs below as of the Circuit Court, and full costs in this Court.

Rose & Ritchie, for the Appellant.

J. A. A. Belle, for the Respondent.

March 6, 1867.

THE QUEEN v. HENRY GRANT.

Indictment—Signature.

Held, that it is sufficient if an indictment be signed by the Clerk of the Crown.

This was a case reserved by Mr. Justice *Sicotte* on the 18th of December, 1866, while presiding in the Court of Queen's Bench sitting on the Crown side at St. Johns. The prisoner, Henry Grant, had been put on his trial for stealing from the person and convicted. An objection was raised by his Counsel, *H. Tugault*, that the indictment could only be signed by the Attorney General, Solicitor General, or persons duly authorized by them, and that the indictment in this instance was not so signed.

The signatures to the indictment were as follows:—

"F. H. Marchand, Clerk of the Crown." "Med. Marchand, Advocate, Prosecuting for the Crown."

T. K. Ramsay appeared for the Crown but was not called upon. The prisoner was unrepresented by counsel.

The judgment of the Court (DUVAL, C. J., AYLWIN, DRUMMOND, BADGLEY, and MONDRIET JJ.) was as follows:

"Seeing that the indictment has been signed by the Clerk of the Crown and it is therefore sufficient, it is ordered that the record be returned and remitted to the Court of Queen's Bench for the District of Iberville, to the intent that such further proceedings be there had as to law and justice may pertain in the premises."

SUPERIOR COURT.

April 12.

EX PARTE TEMPEST, PETITIONER FOR DISCHARGE.

Insolvency—Purchase of goods on credit while hopelessly insolvent—Fraudulent preference.

After the appointment of an assignee in compulsory liquidation, the insolvent cannot retain for his personal expenses moneys paid in to the estate.

A trader who buys goods on credit, impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency. While the vendor on credit takes the risk of the subsequent insolvency of his debtor, he is not supposed to contemplate the escape, or the bankruptcy of

his debtor by reason of a state of insolvency actually existing at the time of the purchase.

The Court will, in the exercise of the discretion which the statute confers upon it, suspend the discharge of a trader who knowing himself to be insolvent and unable to meet his liabilities, conceals the fact and purchases goods on credit, without any reasonable expectation of being able to pay for them.

The discharge of a trader who has granted a fraudulent preference to a creditor, must be absolutely refused.

The examination of an insolvent before the assignee may be used against him by a creditor contesting his discharge.

MONK J. This is an application by William S. Tempest, an insolvent, for his discharge from the Court, under a provision of the Insolvent Act of 1864, which gives him the right to make such application in the event of the requisite proportion of his creditors not consenting to his discharge. In this case, not only do they not consent to it, but a number of them appear and contest his application, and they do so substantially upon three grounds. These are :—

1st. That he fraudulently retained and withheld from the Assignee, moneys belonging to the estate, and especially a sum of \$332. 32 ;

2nd. That the firm of Elliott & Co. purchased goods on credit from the Messrs. Thomson, knowing themselves to be insolvent at the time, and concealing the fact from the vendors, *with the intent to defraud them*, Mr. Tempest being a member of that firm at the time, and it being contended that he participated in the alleged fraudulent act; and

3rd. That the firm of Elliott & Co. had given a fraudulent preference to Mr. Herbert Ellwell, by delivering to him all the negotiable paper held by them at the time of their failure; and also by permitting him to appropriate, in advance, notes not then actually received; and moreover, that these preferences had been given with Mr. Tempest's full consent and participation.

The questions which arise upon this petition, therefore, are among, and in fact are, the most important which can arise in a similar case, and I may add that they are of paramount importance in the perpetually recurring controversy between debtors and creditors, as to the good faith and legality of the acts of the

former, when insolvency is imminent. It may, perhaps, be unnecessary for me to remark to the Counsel concerned for the petitioner, and for the contesting parties, that the Court has examined this case under a deep sense of the responsibility which rests upon its decision, and with a due appreciation of the importance of this matter, as well in regard to the commercial community generally, as to the particular interests of the individuals between whom this contest has arisen. The record discloses with sufficient certainty and clearness the material facts of the case, and which are relied upon by the contesting creditors. Indeed, I may say at once and without hesitation, that with the exception of one or two incidental points of, perhaps, minor importance, and upon which there is some dispute, the counsel differed rather as to the effect of a certain state of facts, not strenuously controverted, than as to the exact nature,—the precise character—of the facts themselves. I shall proceed to advert to these facts and to discuss them in the order in which I have stated the propositions to which they apply.

Upon the first point, then, it is alleged, that Mr. Tempest fraudulently retained, and still withholds, from the assignee, the sum of \$332. 32c, which he received from debtors to the estate.

Now, as a matter of fact, it would appear he did receive a much larger sum than this, in the interval between the service of the writ of attachment, and the appointment of the assignee. But Mr. Tempest states, and it is, moreover, proved, that the whole of the balance, and perhaps a portion of the very sum in question, was applied to the purposes for which it was remitted to the insolvents; namely, to aid in retiring paper then lying in the banks under discount. There was also a small sum applied to paying insurance on the goods of the firm. But there is a portion of the sum complained of as being withheld, to the retention of which very grave objections may be urged. It is not necessary that I should offer any opinion as to how far those persons who remitted to the insolvents, after the publication of the notice in the Gazette, have relieved themselves from liability by so doing. Their action in this respect appears to have

been admitted—sanctioned in fact—and it was, no doubt, done in good faith, and in the interest of the estate. About two-thirds, however, of the sum in question was retained by the insolvents for their personal expenses.

Now, upon this point the statute is precise, is free from all ambiguity. It expressly provides, that the appointment of an assignee in compulsory liquidation, vests in him all the estate and effects of the insolvent, *from the date of the issue of the writ*, as fully and as completely as if, at that date a voluntary assignment had been made; and a voluntary assignment absolutely vests in the assignee to whom it is made, and from the moment of its execution, all the estate and the assets of the insolvent, of every description. It is plain, therefore, that the insolvents had no right to receive, much less to retain and convert to their own use, the moneys remitted to their firm, after the service of the writ in compulsory liquidation. With these facts and the law before me, I can have no hesitation in deciding that the petitioner, who appears to have taken charge of this money, and from whom a portion of it was obtained by his partner when the latter required it, received it illegally, and that he withholds it from the assignee without the sanction of law. So far the case is clear enough, but the presence of the element of fraud is not so manifest—is not so indisputably established. There does not appear to have been any concealment from the assignee of the fact of the reception of the money, though there was apparently some reluctance at first, to give the details of it. The petitioner seems to have taken advice upon the point, and to have acted upon that advice. And the purposes for which the money was retained, according to the evidence adduced, are undoubtedly as unobjectionable as can be conceived compatibly with the retention of the property of others. Upon this point, therefore, the Court is of opinion that the money was illegally retained, but I do not consider it to be proved that it was so retained fraudulently. And if this were the only point submitted to me, I should probably grant the discharge, but I would suspend it until the money was refunded to the assignee.

The second point is one of the most vital

importance to the commercial community; but as I have no precedent, and indeed no previous expression of judicial opinion to guide me, I feel some hesitation in deciding it; and obviously the question is one of considerable difficulty. I have the advantage, however, of a precise detail, a clear description of the facts, chiefly from the Petitioner's own lips, and I am, therefore, not embarrassed by controverted matters of fact, which seldom permit the judgment of a court to rest purely and exclusively upon principle.

The circumstances are as follows: In the Spring of 1864, the firm of Elliott & Co., trading at Montreal, was composed of Mr. Elliott and of the Petitioner. At some time previous to that date, a Mr. Rudiger had also been a partner in the firm, and during their connection with him and up to April 1864, there seems to have been great carelessness, or, at all events, little method in the way their accounts were kept. At that time, however, as it would appear, in contemplation of an arrangement with Mr. Ellwell, and of which I shall have occasion to speak hereafter, a trial balance of their books was made, by which it appeared that their assets were deficient above \$20,000, and there was then a large indebtedness to the Messrs. Shaw, in England, which did not appear in their books. There were, moreover, other matters which do not clearly appear, and consequently, by reason of the facts just mentioned, Mr. Tempest says "Our position would have appeared much worse than it does by the balance sheet." In fact, he states that "by adding to the deficiency exhibited by that sheet, the amount due C. & J. Shaw, we should appear to be, and were \$50,000 short. Our liabilities were then about \$113,000, our assets, after deduction of our own accounts, were about \$62,000."

In April 1864, then, the firm of Elliott & Co. were in a state of absolute and to all appearance hopeless insolvency. It is true that the debt due the Shaws was not being pressed, and they had reason to believe that the payment of this liability would not be harshly, or speedily enforced, and they secured not only the indulgence, but to some extent, the assistance of Mr. Ellwell, who was then a considerable creditor. This double object was attained

by taking Mr. Elwell into their office as a clerk, upon a salary of \$1,000 per annum, and by making him a promise that he should retain all their negotiable paper as collateral security for his debt. But these arrangements did not diminish their liabilities, nor do they appear to have been at any time so advantageous, or so decisive, as to secure them any definite temporary immunity from pressure.

During the Summer and Autumn of 1864, the position of the firm does not seem to have materially changed, for by the trial balance sheet of the 31st Dec., 1864, they still appear to have been above \$50,000 deficient, taking the Shaw debt into account. And here it is to be remarked, that the partners were kept thoroughly informed of the state of their affairs by monthly balance sheets, made with more or less regularity. These balance sheets appear to have varied but little in their results. About the month of March 1865, news came from England that Mr. Shaw was dead, and that the orders of the firm for Spring goods would not be filled. Upon the receipt of this intelligence, the firm decided to stop payment, and appear to have announced that decision to their creditors about the 18th of that month. A balance sheet was subsequently made, bringing down the balance to the 31st March, 1865, and as that was based upon the actual taking of stock of the effects of the firm, its results may be supposed to approach nearly to accuracy, and to exhibit pretty clearly the real state of their affairs. By the sheet prepared under the circumstances to which I have just adverted, it was shown that the actual deficiency amounted to the enormous sum of \$79,990.67, or about \$25,000 advance upon the loss or deficiency exhibited by the balance sheet of December 1864. The explanations which the Petitioner has attempted to give of this sudden and disastrous diminution of assets are unsatisfactory—in fact, they leave the matter unexplained. It may be said, however, and indeed it appears so to me, that this rapid change for the worse in the assets of the firm was more apparent than real—that it was caused by, or resulted from, the fact, that in former balance sheets, the balance of their merchandise account was in a great measure, if not entirely, fictitious, from the irregular entries

with which it was overlaid and for which it is remarkable. Besides, the bad and doubtful debts seem to have been assumed as worth par. These circumstances combined would seem to afford an approximate explanation of the discrepancy, if I may so term it; while at the same time, they render more assured and more conspicuous the entire and irremediable insolvency of the firm during the year preceding the crash. Notwithstanding this state of affairs, of which they could not have been ignorant, during all this period Elliott & Co. continued their business in the usual way. They bought and sold on credit, and late in the year 1864, they made large purchases from Thomsons & Co., on long terms of credit and which had not matured when they stopped payment. Mr. Elliott states that when he made these purchases, the credit of the firm was excellent; that he gave the vendors no intimation of the actual state of their affairs, and that Mr. Tempest was consulted by him in every case before making the purchases in question.

These are the circumstances under which I am called upon to apply the terms of the clause of the Insolvent Act, which provides that a trader who purchases goods on credit, knowing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, and who shall not afterwards have paid the debt, shall be guilty of fraud. Now it would be idle to deny that some of the elements of fraud contemplated by this clause, and which it regards as essential, are present in these purchases from the Thomsons. It is clear, it is in fact beyond controversy, that, knowing themselves to be unable to meet their liabilities, they purchased goods on credit, concealing from the vendors the fact of such inability, and they have not paid for the goods so purchased. But the question which creates the difficulty in my mind is this; had Elliott & Co. at the time the intention of defrauding the Thomsons?

In answer to this enquiry, it may be stated at once, that there is no proof in the record that when they made these purchases they entertained the deliberate intention of not paying for them; and I do not feel justified in

saying—I cannot say, as a matter of fact, that the impression produced on my mind by a perusal and a careful consideration of the testimony adduced is that they had such an intention. The fact appears to be that they went on with their trade without considering the question how far their actions were likely to result in loss or injury to others, and that, with the knowledge that their affairs were in a ruinous condition—in fact rotten to the core, and that their commercial existence hung by the merest thread, they continued incurring liabilities under cover of a seeming—a delusive prosperity, which they themselves well knew to be utterly groundless. It is with great pain that I consider myself bound to speak in these terms of this case—but I do so conceiving it to be my duty, and believing also that an explicit and decided expression of the views of the Court upon this mode of doing business—this species of conduct, must in the end be beneficial. There can be no evasion, no softening down by mitigating presumptions, in the adjudication of this cause. The facts are before me, they are clear and the law is peremptory, and in view of both, the Court is of opinion, that he who buys goods on credit impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency; and further, that while the vendor on credit takes the risk of the subsequent insolvency of his debtor, he is not supposed to contemplate the escape, or the bankruptcy of his debtor by reason of a state of insolvency actually existing at the time of the purchase; that he who knowing the utter insufficiency of his assets and the impossibility of payment, except from the spoliation of others,—he who in fact incurs liabilities of the description of those under consideration, perpetrates a great wrong in the eye of the law. There may not in such a case be an actual, a palpable intention to defraud any particular individual, but there is so reckless a disregard of the rights of those persons generally with whom he deals, as to render a man who so acts deserving of severe reprobation, and so far as a matter of fact established by the evidence of record, I find the petitioner amenable to censure. Even to this extent, it is not without regret, the Court ex-

presses this opinion of the petitioner's conduct; and in doing so, I may add that I should hesitate to adjudge, upon the evidence before me, that in the purchases in question, there was an intent to defraud the Messrs. Thomson: I incline rather to the belief that there was no such deliberate intention. But even so, I entertain so strong an opinion of the impropriety of the petitioner's conduct in this respect, and also of the disastrous consequences to honest traders of the power of conducting business in this manner with impunity, that if this were the only point in issue between the parties, the Court, in the exercise of the discretion which the statute confers upon it, would mark its reprobation of such conduct by suspending the petitioner's discharge for such period of time as would appear to be an adequate vindication of honesty and of fair dealing.

But the third objection urged in the terms of the Act against the application of the petitioner, seems to preclude the exercise of any discretionary power on my part to relieve him finally from his liabilities. He is charged with having granted or concurred in granting, a fraudulent preference to Mr. Elwell, of whom I have already spoken: That he did so both by handing him over the negotiable paper of the firm in contemplation of insolvency, and by conspiring with him (Mr. Elwell) to enable him to get possession of other negotiable paper which was expected, but not actually received, at the time the creditors of the firm were called together. The circumstances under which the transactions with Mr. Elwell took place are of a very peculiar and exceptional character, and require some description in order that my view of their effect may be fully understood.

About the time of the trial balance of April 1864, Mr. Elwell, as before stated, entered into the employ of the firm of Elliott & Co., and was made acquainted at the time with the unfavorable result shown by that balance, as well as with the additional debt due the Shaws. On the 21st April, 1865, the day of the meeting of creditors previously called, a large number of notes, comprising the entire amount of Bills receivable then held by the firm of Elliott & Co., were stated to be in the

hands of Mr. Elwell, as collateral security for his debt. In the words of Mr. Tempest himself, "all the notes which did not appear by the Bill book to have been disposed of are in the hands of Mr. Elwell," except those given to certain firms whom he names. The circumstances under which Mr. Elwell acquired these notes cannot be more clearly described than in the language of the petitioner himself. He says:—

"Being asked who gave the said notes to Mr. Elwell, I say that he has always received them for the last nine or ten months. What I mean is, that whenever they came into our office, they were taken charge of by him in the ordinary course. This has been the regular practice in our office for the last 9 or 10 months, and all the notes appearing by the Bill-book to have been received by us during that time have followed that course. It commenced on the 3rd May, 1864, since which time he kept our bill-book and cash-book, and superintended the keeping of all our other books. We gave him a salary of \$1000 a year. It was his particular business to receive, take care of, and enter all cash and bills received, and to see that the other books were kept properly. Nearly all the entries in the bill-book since May 3rd, 1864, are in his handwriting, and also a great number of entries in the cash book during the same period. Since the 1st September last, all the entries in the cash book are by him. The entries in our discount-book since May, 1864, are also nearly all made by him. The notes which appear in the statement A, as being held by him as collateral, were received by him in the same manner as all other notes received in our business since 3rd May, 1864. I swear that I delivered to Mr. Elwell with my own hand, as collateral security for the said debt of \$14,328.76, the notes mentioned in this statement A, as being held by him as collateral.

Q. Which of the two statements that you have just made, respecting the reception by Mr. Elwell of the said collateral notes, is the true one?

A. I swear they are both perfectly correct. A few days before we suspended payment, he brought these notes to me in a bundle, which I perfectly understood contained all the notes

in the premises, and asked me if I had a large envelope. I took them from him, passed them into a large envelope, sealed it up, wrote his name on it, and handed it back to him. I cannot state the exact date on which this took place, but it must have been either on or after the 20th April last, as I perceive by the bill-book, that the entries of the said notes in the bill-book are made in his own handwriting down to the 20th April inclusive. There was a meeting of our creditors held at our office on the 21st (or thereabouts) of April last, at which meeting there was a discussion about these notes given to Elwell. The writ of attachment was served the next day. I swear that the notes in question were handed over to Mr. Elwell before the day of the meeting of creditors. Mr. Elwell was perfectly aware that we had called a meeting of our creditors for the following day. In fact he knew as much about our business as we did ourselves. To the best of my knowledge and belief the said notes were placed by me in the said envelope as already stated. I think our firm stopped payment about the 18th March last."

If confirmation of this statement made by Mr. Tempest himself were necessary, it is furnished by Mr. Elwell. He declares that he knew during the whole of 1864 that the firm were over \$40,000 worse than nothing, and that he was perfectly aware of the stoppage, and of the meeting of creditors that had been called in consequence.

The debt for which the collateral security was given amounted to about \$14,000, besides endorsements which Mr. Elwell had given for the accommodation of the firm, and the greater portion of this debt had accrued previous to July, 1864, Mr. Elwell, having as he expressed it, been advancing to them for some years before he entered their employ.

It would appear, therefore, from the statement of the parties to the transaction, that Mr. Elwell received from the petitioner on the eve of the meeting of creditors a large amount of negotiable paper belonging to Elliott & Co., and endorsed by them as collateral security of a pre-existing debt; that when he received it, he, Elwell, knew that the firm was insolvent, and that he would therefore obtain an advance at the expense of the other creditors; and,

finally, that it was so given to him by the petitioner himself with that intention. These facts would bring the petitioner strictly within the provisions of the Insolvent Act, §8, par. 1 and 4. But it is contended on his behalf that they may be sustained by other circumstances which gave Mr. Elwell a valid title to that negotiable paper before it was handed to him on the 20th April, or at all events, a lien upon it. He alleges that by the terms of his agreement with Elliott & Co., in April, 1864, he was to enter their employ, keep or superintend their books—receive their negotiable paper and the like, with a salary of \$1000 per annum and that he was to retain and hold all such negotiable paper as security for his advances to them, as well in the future as those previously made which were considerable; and that in fact the negotiable paper was received and was held by him from the time at which it was received as such security.

This pretension may be considered from two points of view, namely, as to its legality, and then in regard to its truth. If the agreement were proved and had been carried out by the reception by Mr. Elwell, on his own account, of all the negotiable paper of the firm, it is probable that the agreement would have been regarded as a fraud upon the creditors of the firm, in view of the knowledge of Mr. Elwell of the insolvency of Elliott & Co., and of the fact of his debt being pre-existent, to say nothing of the secrecy of the transaction which was calculated to mislead, in fact to deceive third parties, and to lead them into error as to the position and resources of Elliott & Co. But in point of fact, it is not proved that such an agreement, if made, was ever carried into effect. It is true that Mr. Elwell became the clerk of Elliott & Co., and that their negotiable paper passed through his hands; but there is no proof that he ever held it as pledgee until it was delivered to him on the 20th April, 1865, by the petitioner. Previous to that day he took care of it, had it in his charge; namely, in the office of the firm and in their safe, and in a box, in which, though he claimed it as his, he also kept small change, checks and other matters belonging to the firm; while he thus had the custody of this negotiable paper, the firm used it, dis-

counted part of it, and pledged part of it to Moss, Hagar and others, as appears by the Bill-Book, kept by Mr. Elwell, and by the deposition of the petitioner. In fact, so far as can be discovered or ascertained from the record, Mr. Elwell exercised no right of ownership over any part of this negotiable paper, till it had been personally placed in his hands by Mr. Tempest the day before the meeting of creditors. This distinction is indicated by Mr. Tempest himself in the extract from his examination already read, in which the reception of the paper as a clerk, and the delivery of it to him as collateral security, are spoken of as independent occurrences.

Under these circumstances, the Court is clearly of opinion that the possession of Mr. Elwell previous to the 20th of April was that of a clerk merely; without any legal right of lien or other right in the negotiable paper in his custody, as it is above established in evidence; and that he became possessed of it as security for his claim only when it was handed to him on the 20th of April by the petitioner. And I am further of opinion, that the petitioner by so delivering it to him, gave him a fraudulent preference within the meaning and intent of the Act.

There is, moreover, another circumstance somewhat extraordinary connected with this charge of fraudulent preference, and which cannot be passed over without notice. In a species of blotter purporting to contain a list of good debts due to the firm, the amount of those debts was entered as being \$7,277.67, while in the statement submitted at the meeting of the creditors they are entered as amounting only to \$1,602.05, the deficiency being \$5,675.62. This discrepancy is accounted for by Mr. Elwell in the following manner. He says: "I am aware that in statement A, I am charged as having received as collaterals over \$9000 of bills receivable, but in this sum was included about \$2,000 which I had not received, but which were to be given to me by the defendants when they came. In statement A, therefore, the entry is made as if the bills had been actually received and delivered to me. The accounts were rendered, and the debtors were requested to send down notes for the amount, and I had an under-

standing with the defendants that when they came, they were to be given to me. It is that arrangement which creates the discrepancy between the total amount of good debts as shown by statement A. That discrepancy amounts to \$5,675.62 currency, of which notes to the amount of \$3,600 were received and are in the bill book, and the remainder are what I was intended to receive. Mr. Tempest, one of the defendants, was aware of all this; Mr. Elliott took very little interest in it." So that if this statement be correct, not only the amount of notes actually on hand, but those that were expected to arrive, were to be given to Mr. Elwell; and to conceal this arrangement from the creditors, these expected notes were entered in the statement submitted to the creditors as if they had been actually received, and a corresponding amount deducted from the good debts. This circumstance, though apparently of minor importance, should not be overlooked in the consideration of this case.

The petitioner seeks to throw the responsibility of this most reprehensible exhibition of accounts upon Mr. Elwell. He states that the account A, in which it occurs, was made out under the direction and personal superintendence of Mr. Elwell, and that he himself did not see it till it was in the hands of the creditors: a fact, that it was not finished when they assembled, and that it was submitted and read without his having an opportunity of making himself acquainted with its contents. He himself has given evidence upon this point, and his statement that he had not seen the account A, before it was shown to the creditors is corroborated by Mr. Elwell and Mr. Douglas, the bookkeeper. But the material question for my consideration is not whether he agreed to the statement A, but whether he agreed to the expected notes being taken to account by Mr. Elwell as if they had been received; and upon this point the evidence appears to bear strongly against the petitioner. Mr. Elwell distinctly states that although the petitioner did not agree to the entry in the form in which it was made, yet he knew all about the transaction itself; and although it was attempted to put the construction upon this statement that it was made as

applicable to the arrangement generally with Mr. Elwell, and not to this particular transaction, yet the declaration of Mr. Elwell himself making the distinction between Mr. Tempest's knowledge of the entry, and his knowledge of the fact, combined with the statement of Mr. Elliott's comparative ignorance of it, appears to negative this construction. It is, moreover, scarcely credible that Mr. Tempest, who was the office man of the firm, should not know whether his good debts amounted to \$1,500 or to \$7,000—and whether Mr. Elwell held notes to the amount of \$7,000 or \$9,000 as collateral security. Upon the whole, and after a careful consideration of the testimony adduced on this point, I incline to the belief of Mr. Tempest's knowledge of the transaction as embodied in the report submitted to the creditors, and I find it extremely difficult to bring myself to the conclusion that he was ignorant of it.

There were one or two incidental points raised by counsel at the argument which may as well be disposed of, and which require but few remarks and no discussion. It was objected that the state of the affairs of the insolvents as submitted by their books, and the manner in which these books were kept, and the entries made in them, could not be referred to by the contestants, because it was not expressly alleged in the contestation that the books of Elliott & Co. were irregularly or erroneously kept. If, indeed, these matters had been referred to and made the subject of discussion, as constituting a special and substantial ground of objection to the discharge—I should not have bestowed upon them any attention, unless they had been set forth by express allegation. But under the contestation and the issue joined, they are admissible in evidence to show that the firm of Elliott & Co. were insolvent long before they stopped payment, and that, moreover, they were aware of the fact.

It was also objected that the examination of the petitioner could not be made use of as evidence against him on this contestation, but I am clearly of opinion that such a pretension is wholly untenable.

In conclusion, I have only to add, that after a very careful consideration of the law

and all the facts of this case, I am, with much reluctance, forced to the conclusion that this application must be refused, and it is rejected accordingly.

A. & W. Robertson, for the petitioner.

J. J. C. Abbott, Q. C., for the creditors contesting.

April 12.

EX PARTE WATT, PETITIONER FOR DISCHARGE.

Insolvency—Grounds for refusing discharge.

Discharge of a debtor under the Insolvent Act refused, where it was proved that he had granted fraudulent preferences, and had traded extensively without capital, though without the intention of committing fraud.

MONK, J. This is also an application for discharge by an Insolvent, and my remarks in the preceding case will apply in great measure to this. In June, 1864, the petitioner, Mr. Watt, purchased from Cuvillier & Co. \$13,000 worth of wheat for cash. The purchase was made through Mr. Heward, broker, and bought and sold notes were exchanged. The sale was for cash, but when Mr. Heward called on Mr. Watt for the money, the latter said he could not pay just then. Mr. Heward then went to Mr. Cuvillier who directed him to get Mr. Watt to give his cheque payable on the Monday following, and he would not present the cheque before mid-day. Mr. Watt accordingly gave his cheque payable at the Bank of Montreal; but Mr. Cuvillier presented the cheque an hour before noon, and there were no funds to meet it. Mr. Watt then found himself obliged to suspend payment, after an unsuccessful attempt to obtain accommodation from the Bank of Montreal. It shows the position in which Mr. Watt was at the time, that the simple fact of presenting the cheque an hour too soon obliged him to suspend. He was carrying on business without any capital, in fact, a gambler, not in a bad sense, but as one trying to make money without any capital. I have no doubt that Mr. Watt intended to pay for the wheat when he bought it, and he is not to be charged with fraud. But such was the state of his affairs that the least thing was

sufficient to stop him. His transactions were enormous. I think it the duty of the Court to express disapprobation of such a reckless style of business, supported by accommodation obtained from the banks, and carried on without any capital. Mr. Watt failed for \$287,000, and his assets do not appear to amount to anything at all. If there was nothing else in the case, I would have suspended Mr. Watt's discharge for a time, for the purpose of marking the opinion of the Court on such a reckless style of doing business. But there are three grounds alleged in opposition to his discharge. 1st. That he traded extensively, knowing that he had no means. 2nd. That he gave fraudulent preferences. 3d. That he prevaricated in his statements. There does not appear to be any ground for charging him with prevarication. As to fraudulent preferences, this is a thing which there are no means of effectually guarding against. Mr. Watt is charged with having paid \$9,500 by fraudulent preference about the time of his failure. He says that in one case he only paid over the proceeds of grain just purchased, but of this there is no proof; and in another instance that he merely returned goods which remained intact, on which the vendor had a lien, and that he consulted Mr. Janes, who was his creditor to the amount of \$50,000, and also his assignee, on the propriety of doing so, and obtained his sanction. But the fact of Mr. Janes being a creditor to the amount of \$50,000, and assignee, did not qualify him to give an opinion. Under the circumstances, the Court cannot sanction these payments. I do not say that Mr. Watt intended to commit any fraud; on the contrary, I believe he did not. But taking into consideration the very reckless way in which he was doing business, and the fact of these payments made at the time he was about to call his creditors together, I feel bound to refuse his discharge. At the same time, I hope that the creditors will come to some understanding, and themselves consent to give Mr. Watt his discharge.

Torrance & Morris, for the Petitioner.

Cartier, Pominville & Bétournay, for Cuvillier & Co., contesting.

THE BAR OF LOWER CANADA.

SECTION OF THE DISTRICT OF MONTREAL.

Annual Report of the Council.

The Council of this Section of the Bar have to report that the amendments to the Act of Incorporation and to the By-Laws, which were suggested and carried through by this Section during the past year, have proved highly advantageous to the interests of the Bar and to the community generally. More efficiency has been given to the Councils in maintaining the discipline of the members—the duties and powers of the Sections and of the General Council have been more clearly defined—and the standard of qualification in Candidates for admission to study and to practice has been raised—while the funds of the Corporation have been increased by a higher rate of fees on admissions. It is impossible to point out at this time all the good effects of these amendments. They will be more apparent after they have been a few years in operation.

The Council have been enabled to grant to the Library Committee during the year the sum of \$350 for the purchase of books. In their report they say, that “by means of the appropriation of \$350 during the past year, in addition to votes in the two previous years of \$500, making in the aggregate \$850, the Committee have been enabled to add many valuable works to the Library. A list of them is to be found in the Library Room. The cash now in hand is \$205, but orders have been issued for new books which will more than exhaust this sum. The details of the application of the rest will be seen in the annexed statement of account. A book has been opened for the entry of suggestions as to the works which it is desirable to purchase, and the Committee trust that the means at the command of the Council may in future allow of a regular and ample vote—sufficient to maintain and enlarge so important an adjunct of the Bar.”

The treasurer's report is given below, and compares favourably with former years; the receipts of this year being \$2,636 91, against \$2,290 46 for last year, while the expenditure this year amounts to \$1,826 08, against \$1,

422 56 last year. The Council regret, however, to say that the arrears of Bar subscriptions amount in all to at least \$1,600. Some of the members in arrear belong to this District, but most of them reside in the other Districts included in this Section, and complain of being taxed so heavily for advantages in which they participate so little. As a remedy for this, the Council respectfully recommend that the Act of Incorporation be so amended that, for the future, the subscriptions of members of this Section residing without the limits of this District be reduced to \$2 per annum; and further, that no Member of the Bar be permitted to practice unless he has paid his subscription. This would increase the revenue of the Section, while the burden of supporting the expense of the Bar would no longer be thrown, as it is now, on the few.

The change which has been introduced into the mode of admitting candidates to practice and to study has been found satisfactory. A list of works has been prepared by the Committees, which indicates to the candidate what he is expected to read during his studentship. This has been printed and circulated. The number of candidates admitted to practice during the past year is 28, and to study 30. This is a decrease on former years, as will appear by the following figures:

	Admission to Practice	To Study
For the year ending April 30, 1864.	41	53
“ “ “ 1865.	34	49
“ “ “ 1866.	55	29
“ “ “ 1867.	28	30

In matters of discipline there has been only one complaint, which has been carried on to judgment, and in that case the defendants were censured by the Batonnier. There were two complaints presented against Members of the Bar, in which the Council did not think that there were sufficient grounds for proceeding, and two others on which proceedings were commenced but discontinued for want of proof.

All which is submitted.

A. ROBERTSON,
Batonnier

H. L. SNOWDON,
Secretary

MONTREAL, 1st May, 1867.

THE TREASURER IN ACCOUNT WITH THE BAR OF LOWER CANADA, SECTION OF THE DISTRICT OF
MONTREAL, FOR THE YEAR ENDING APRIL 30, 1867

CR.

By paid to the Library Committee.....	\$550 00	To balance 1st May, 1866.....	\$688 24
to the General Council on the order of the Bâtonnier.....	269 00	" amount of Annual Subscriptions.....	720 00
" Salary of Employés, Insurance and other expenses.....	1,268 08	" fees on 86 Diplomas.....	505 00
Cash in hand.....	900 88	" on 16 Certificates for admission to study.....	80 00
		" on 12 Certificates for admission (under new law).....	240 00
		" amount of disbursements on an accusation.....	1 17
		" arrears of fees on admissions to study & on diplomas.....	222 00
		" proceeds of sale of By-Laws of the Bar.....	9 50
		" amount from Secretary of Bar Dinner.....	1 00
		To balance.....	\$2,628 91
			\$600 83

DR.

OFFICE BEARERS FOR 1867-8

Joseph Doutre, Q. C., *Bâtonnier*; Rouer Roy, Q. C., *Syndic*; W. W. Robertson, *Treasurer*; Joseph O. Joseph, *Secretary*.

COUNCIL:

A. Robertson, Q. C., S. Bethune, Q. C., R. Mackay, A. Cross, Q. C., R. Lafamme, Q. C., Hon. A. A. Dorion, Q. C., F. Cassidy, Q. C., L. A. Jetté.

LIBRARY COMMITTEE:

R. Mackay, S. Bethune, Q. C., F. W. Torrance, Rouer Roy, Q. C., P. R. Lafrenaye, A. Cross, Q. C., W. F. Gairdner.

BROUGHAM'S ADVICE TO MACAULAY.

The following letter, written by Lord BROUGHAM to the father of the late Lord MA-

CAULAY, contains valuable suggestions for young men who have selected the Bar for their profession.

"Newcastle, March 10, 1823.

"MY DEAR FRIEND,—My principal object in writing to you to-day is to offer you some suggestions, in consequence of some conversation I have just had with Lord Grey, who has spoken of your son (at Cambridge) in terms of the highest praise. He takes his account from his son; but from all I know, and have learnt in other quarters, I doubt not that his judgment is well formed. Now you, of course, destine him for the Bar; and assuming that this, and the public objects incidental to it, are in his views, I would fain impress upon you (and through you upon him) a truth or two which experience has made me aware of, and which I would have given a great deal to have been acquainted with earlier in life from the experience of others.

"First, that the foundation of all excellence is to be laid in early application to general knowledge is clear; that he is already aware of; and equally so it is (of which he may not be so well aware) that professional eminence can only be attained by entering betimes into the lowest drudgery, the most repulsive labors of the Profession; even a year in an attorney's office as the law is now practised I should not hold too severe a task, or too high a price to pay, for the benefit it must surely lead to; but at all events the life of a special pleader, I am quite convinced, is the thing before being called to the Bar. A young man, whose mind has once been well imbued with general learning, and has acquired classical propensities, will never sink into a mere drudge. He will always save himself harmless from the dull atmosphere he must live and work in, and the sooner he will emerge from it, and arrive at eminence. But what I wish to inculcate especially, with a view to the great talent for public speaking which your son happily possesses, is, that he should cultivate that talent in the only way in which it can reach the height of the art; and I wish to turn his attention to two points. I speak on this subject with the authority both of experience and observation. I have made it very

V. P. W. DORION, *Treasurer*.

MONTREAL, 1st May, 1867

much my study in theory; have written a great deal upon it which may never see the light and something which has been published; have meditated much and conversed much on it with famous men; have had some little practical experience in it, but have prepared for much more than I ever tried, by a variety of laborious methods—reading, writing, much translation, composing in foreign languages, &c.; and I have lived in times when there were great orators among us; therefore I reckon my opinion worth listening to, and the rather because I have the utmost confidence in it myself, and should have saved a world of trouble and much time had I started with a conviction of its truth.

"1. The first point is this,—the beginning of the art is to acquire a habit of easy speaking; and in whatever way this can be had, (which individual inclination or accident will generally direct, and may safely be allowed to do so,) it must be had. Now, I differ from all other doctors of rhetoric in this—I say, let him first of all learn to speak easily and fluently, as well and as sensibly as he can, no doubt, but at any rate let him learn to speak. This is to eloquence, or good public speaking, what the being able to talk in a child is to correct grammatical speech. It is the requisite foundation, and on it you must build. Moreover, it can only be acquired young; therefore, let it by all means, and at any sacrifice, be gotten hold of forthwith. But in acquiring it every sort of slovenly error will also be acquired. It must be got by a habit of easy writing, (which, as Wyndham said, proved hard reading)—by a custom of talking much in company—by speaking in debating societies, with little attention to rule, and more love of saying something at any rate than of saying anything well. I can even suppose that more attention is paid to the matter in such discussions than to the manner of saying it; yet still to say it easily, *ad libitum*, to be able to say what you choose, and what you have to say, this is the first requisite, to acquire which everything else must for the present be sacrificed.

"2. The next step is the grand one—to convert this style of easy speaking into chaste eloquence. And here there is but one rule.

I do earnestly entreat your son to set daily and nightly before him the Greek models. First of all he may look to the best modern speeches, (as he probably has already); Burke's best compositions, as the 'Thoughts on the Cause of the present Discontents'; speech 'On the American Conciliation,' and 'On the Nabob of Arcot's Debt'; Fox's 'Speech on the Westminster Scrutiny,' (the first part of which he should pore over till he has it by heart); 'On the Russian Armament,' and 'On the War,' 1803, with one or two of Wyndham's best, and very few, or rather none, of Sheridan's. But he must by no means stop here. If he would be a great orator, he must go at once to the fountain head, and be familiar with every one of the great orations of Demosthenes. I take for granted that he knows those of Cicero by heart; they are very beautiful, but not very useful, except, perhaps, the 'Milo, pro Ligario' and one or two more; but the Greek must positively be the model; and merely reading it, as boys do, to know the language, won't do at all; he must enter into the spirit of each speech, thoroughly know the positions of the parties, follow each turn of the argument, and make the absolutely perfect and most chaste and severe composition familiar to his mind. His taste will improve every time he reads and repeats to himself, (for he should have the fine passages by heart), and he will learn how much may be done by a skilful use of a few words, and a rigorous rejection of all superfluities. In this view, I hold a familiar knowledge of Dante to be next to Demosthenes. It is in vain to say, that imitations of these models won't do for our times. First, I do not counsel any imitation, but only an imbibing of the same spirit. Secondly, I know from experience that nothing is half so successful in these times (bad though they be) as what has been formed on the Greek models. I use a very poor instance in giving my own experience, but I do assure you that both in Courts of Law and Parliament, and even to mobs, I have never made so much play (to use a very modern phrase) as when I was almost translating from the Greek. I composed the peroration of my speech for the Queen, in the Lords, after reading and repeating Demosthenes for three or four weeks, and

I composed it twenty times over at least, and it certainly succeeded in a very extraordinary degree, and far above any merits of its own. This leads me to remark, that though speaking without writing beforehand, is very well until the habit of easy speech is acquired, yet after that he can never write too much; this is quite clear. It is laborious, no doubt, and it is more difficult beyond comparison than speaking off-hand; but it is necessary to perfect oratory, and, at any rate, it is necessary to acquire the habit of correct diction. But I go further, and say, even to the end of a man's life, he must prepare word for word most of his finer passages. Now, would he be a great orator or no? In other words, would he have almost absolute power of doing good to mankind, in a free country, or no? So he wills this, he must follow these rules.

"Believe me truly yours,

"H. BROUGHAM."

RECENT ENGLISH DECISIONS.

Principal and Agent—Extent of Authority—Secret Limit.—The defendant authorized an insurance broker at Liverpool to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel. The broker, acting in excess of this authority, and without the knowledge of the defendant, underwrote a policy for the plaintiff for £150. The plaintiff was not aware that the broker's authority was limited to any particular sum, but it is notorious in Liverpool that in nearly all cases there is a limit of some sort, which remains undisclosed to third persons, imposed on brokers by their principals. In an action upon the policy:—*Held*, 1st, that the defendant was not liable for the amount underwritten, the broker having exceeded his authority; and, secondly, that the contract whereon the action was founded was not capable of division, and, therefore, that the defendant was not liable to the extent of £100. *Baines v. Ewing*, Law Rep. 1 Ex. 320.

Statute of Frauds—Parol Acceptance.—A proposal in writing, signed by the party to be charged, and accepted by parol by the party

to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds. *Reuss v. Pickley*, Law Rep. 1 Ex. 342.

Statute of Limitations—Acknowledgment.—The defendant, being indebted to the plaintiff, wrote to the plaintiff, before the debt was barred by the Statute of Limitations, a letter containing these words, "I will try to pay you a little at a time if you let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week":—*Held*, a sufficient acknowledgment in writing within 9 Geo. c. 14, s. 1. *Lee v. Wilmot*, Law Rep. 1 Ex. 364.

Attestation of Will.—If a testator signs his will in the presence of the attesting witnesses who see him in the act of writing, and they then attest, the attestation is good, although they do not see the signature, and he does not acknowledge it.—The attesting witnesses to a will saw the testatrix writing something on the will before they signed, but they did not see what she wrote, and they did not know that it was a will. When they subscribed their names they did not see the attestation clause, which contained the testatrix's signature, or any of the writing on the will, as the testatrix concealed it from them by holding a piece of blotting-paper over it. There was a full attestation clause in the testatrix's handwriting:—*Held*, that as the witnesses had seen the testatrix write what the Court presumed to be her signature, although they did not see the signature, and she did not acknowledge it to them, the attestation was sufficient. *Smith v. Smith*, Law Rep. 1 P. & D. 143.

Will—Clause following signature.—A will contained a reference to executors "hereinafter named," but did not appoint executors. A clause appointing executors was written immediately underneath the testator's signature:—*Held*, that the reference in the will was not such a reference to the clause appointing executors as a document in existence at the time of the execution as to incorporate it, or to justify the Court in receiving parol evidence that it was written before the will was signed. *In the Goods of Dallow*, Law Rep. 1 P. & D. 189.

TABLE OF CASES DECIDED IN LOWER CANADA REPORTED IN THIS VOLUME.

	PAGE		PAGE
Angers and Ermatinger.....	159	Ellice and <i>Regina</i>	11
Beaudry and The Corporation of Montreal	231	Ennis and The Grand Trunk Railway of	
Beaudry and Roy.....	20	Canada.....	113
Bell, Tourville v.....	41	Ermatinger, Angers and.....	158
Benson v. Mulholland.....	185	Evans and Cross.....	79
Bergeron, Brahadi and.....	67	Evanturel, Larue and.....	112
Bethune, Wardle and.....	18	Fahrland and Rodier.....	83
Bignon, Montreal City Passenger Rail-		Farrell v. Glassford.....	37
way Co. and.....	21	Ferrier and Dillon.....	160
Bissonette and Bornais.....	18	Foley and Forester.....	16
Black and Lefebvre.....	13	Forgues, Rochette v.....	185
Bornais, Bissonette and.....	18	Forester, Foley and.....	16
Bordeau v. Grand Trunk Railway of		Freer and Maguire.....	104
Canada.....	186	Gauthier, Latour and.....	109
Bourne, Sheridan v.....	40	Gauvreau, Morgan and.....	248
Brahadi and Bergeron.....	67	Genier, Woodman and.....	200
British American Land Co., Valls and..	71	Gibson and Moffatt and Supple.....	66
Brown, <i>Ex parte</i>	23	Gibson and Moffatt and Young.....	60
Brown, Guly v.....	222	Glassford, Farrell v.....	37
Brown, Trinity House v.....	133	Grant, <i>Regina</i> v.....	276
Brown v. The Quebec Bank.....	253	Grand Trunk Railway of Canada, Ennis	
Brunet, Lalonde and.....	18	and.....	113
Bryson and Stutt.....	81	Grand Trunk Railway of Canada, Bour-	
Burroughs and Kiernan.....	108	deau v.....	186
Butler, Pennoyer and.....	21	Grant, Hunter and.....	107
Campbell, Lovell v.....	131	Grant and Lochhead.....	106
Campbell v. The Liverpool and London		Gregory, Ireland v.....	132
Insurance Co.....	224	Groulx and Corporation of the Parish of	
Cook and Verrault.....	182	St. Laurent.....	11
Courville, Sache and.....	251	Guertin, Russel v.....	42
Crébeas and Massue.....	22	Guillemette and Larochelle.....	111
Cross, Evans and.....	79	Guly v. Brown.....	222
Daoust, <i>Regina</i> v.....	29	Harnois and St. Jean.....	19
Deal v. Corporation of Philipsburg.....	40	Hart v. O'Brien.....	187
De Beaujeu and Deschamps.....	68	Hogle and McCorkill.....	108
De Beaujeu and Lalonde.....	68	Hotel Dieu de Montreal and Village de	
Demers, Wilson and.....	251	St. Jean Baptiste.....	160
Deschamps, De Beaujeu and.....	68	Hubert v. Renaud <i>dît</i> Deslauriers.....	41
Desjardins v. Tassé.....	89	Hunter and Grant.....	107
Deslauriers, Renaud <i>dît</i> , Hubert v.....	41	Ireland and Duchesnay.....	227
Desorcy, Corporation of the Parish of St.		Ireland v. Gregory.....	132
Barthelemy and.....	16	Jaques, Watt and.....	19
Dearochers, Brien <i>dît</i> , Prevost and.....	82	Jodoin, Lacoste v.....	41
Dillon, Ferrier and.....	160	Jodoin, Rolland and.....	20
Dionne and Valteau.....	112	Jones and Guyon <i>dît</i> Lemoine.....	16, 161
Doran v. Duggan.....	127	Kelly and Morehouse.....	68
Dorion and Kierzkowski.....	69	Kierzkowski, Dorion and.....	69
Dubord v. Lanctot.....	89	Kiernan, Burroughs and.....	108
Duchesnay, Ireland and.....	227	Knapp and Griffin, Royal Insurance Co.	
Duggan, Doran v.....	127	v.....	189, 201
Duplessis, Nordheimer and.....	105	Lacoste v. Jodoin.....	41
Duvernay v. Corporation of the Parish of		Lalonde, De Beaujeu and.....	68
St. Barthelemy.....	36	Lalonde and Brunet.....	18
Eastern Townships Bank and Pacaud..	270	Lanctot, Dubord v.....	89
Eastman v. Roland.....	216	Larochelle, Guillemette and.....	111

	PAGE		PAGE
Larue and Evanturel.....	112	Regina, Ellice and.....	11
Latour and Gauthier.....	109	Regina v. Grant.....	276
Lefebvre, Black and.....	13	Regina v. McDonald.....	34
Legault and Legault.....	10	Regina v. Murray.....	87
Leger and Tate.....	110	Regina v. Paxton.....	162
Lemoine, Guyon dit, Jones and.....	16, 161	Regina v. Pickup.....	35
Lemoine v. Lionais.....	162	Regina, Ramsay v.....	231, 246
Lemoine, O'Heir and.....	199	Renaud and Proulx.....	126
Lighthall v. Walker.....	43	Richelieu Navigation Co., Torrance v.....	133
Lionais, Lemoine v.....	163	Rochette v. Forgues.....	185
Liverpool and London Insurance Co., Campbell v.....	224	Rodier, Fahrland and.....	83
Lochhead, Grant and.....	106	Rodier, Samuels and.....	272
Loiseile v. Loiseile.....	37	Roland, Eastman v.....	216
Lozeau, President et Syndics de la Com- mune de la Seigneurie de la Baie St. Antoine, and.....	154	Rolland and Jodoin.....	20
Lovell v. Campbell.....	131	Rolland and St. Denis.....	110
McCorkill, Hogle and.....	108	Routh, Ryland v.....	44
McCulloch, Tees v.....	135	Roy, Beaudry and.....	20
McDonald and Nivin.....	151	Royal Insurance Co. v. Knapp and Grif- fin.....	189, 201
McDonald, Regina v.....	34	Russell v. Guertin.....	42
McGowan, Masson v.....	37	Ryland v. Routh.....	44
Maguire, Freer and.....	104	Sache and Courville.....	251
Masson v. McGowan.....	37	St. Antoine, President et Syndics de la Commune de la Seigneurie de la Baie, and Lozeau.....	154
Massue, Crebassa and.....	22	St. Barthelemy, Corporation of the Parish of, and Desorcy.....	16
Montreal, The Corporation of, Beaudry and.....	231	St. Barthelemy, Corporation of the Parish of, Duvernay v.....	36
Montreal City Passenger Railway Co. and Bignon.....	21	St. Denis, Rolland and.....	110
Montreal and Champlain Railroad Co. and Perras.....	17	St. Jean, Harnois and.....	19
Moreau, Owler and.....	84	St. Jean Baptiste, Corporation Village de, Hotel Dieu de Montreal and.....	160
Morehouse, Kelly and.....	68	St. Laurent, Corporation of the Parish of, Groulx and.....	11
Morgan and Gauvreau.....	248	Samuels and Rodier.....	272
Morin and Palgrave.....	111	Sheridan v. Bourne.....	40
Mulholland, Benson v.....	185	Smith, Naud and.....	59
Mullin, Taylor v.....	200, 250	Sorel, The Corporation of, Walker and.....	22
Murray, Regina v.....	87	Stutt, Bryson and.....	81
Naud and Smith.....	59	Supple, Gibson and.....	66
Nivin, McDonald and.....	151	Tassé, Desjardins v.....	88
Nordheimer and Duplessis.....	105	Tate, Leger and.....	110
O'Brien, Hart v.....	187	Taylor v. Mullin.....	200, 250
O'Connor and Raphael.....	229	Tees v. McCulloch.....	135
O'Heir and Lemoine.....	199	Tempest, <i>Ex parte</i>	276
Owler and Moreau.....	84	Thurber, <i>Ex parte</i>	129
Pacaud, Eastern Townships Bank and.....	270	Torrance v. Richelieu Navigation Co.....	133
Palgrave, Morin and.....	111	Tourville v. Bell.....	41
Paxton, Regina v.....	162	Trinity House v. Brown.....	133
Pennoyer and Butler.....	21	Valleau, Dionne and.....	112
Perras, Montreal and Champlain Rail- road Co. and.....	17	Valls and The British American Land Co.....	71
Philipsburg, Corporation of, Deal v.....	40	Verrault, Cook and.....	182
Pickup, Regina v.....	35	Walker, Lighthall v.....	43
Poirier, Prevost v.....	40	Walker and The Corporation of Sorel.....	22
Prevost v. Poirier.....	40	Wardle and Bethune.....	18
Prevost and Brien dit Desrochers.....	82	Watt, <i>Ex parte</i>	284
Proulx, Renaud and.....	126	Watt and Gould and Jaques.....	19
Quebec Bank, Brown v.....	253	Wilson and Demers.....	251
Ramsay v. Regina.....	231, 246	Woodman and Genier.....	200
Raphael, O'Connor and.....	229	Young, Gibson and.....	60
Regina v. Daoust.....	29		

INDEX TO CASES DECIDED IN LOWER CANADA, REPORTED IN THIS VOLUME.

	PAGE
ACTION, institution of, within C.S.C. cap. 23. <i>Ennis and Grand Trunk Railway</i>	113
ACTION, right of, in district where personal service is made. <i>See SEPARATION DE BIENS.</i>	
ADVOCATE.—An advocate of Lower Canada, acting as attorney of record for himself in a suit to which he is a party, is entitled to the "attorney's fees," as fixed by the tariff. <i>Gugy v. Brown</i>	222
AGENT.— <i>See OPPOSITION.</i>	
APPEAL IN FORMA PAUPERIS.— <i>Held</i> , that an appeal <i>in forma pauperis</i> will not be allowed to the Court of Queen's Bench sitting on the Appeal Side. <i>Legault and Legault</i>	10
APPEAL 2.— <i>Held</i> , that there is no appeal from a judgment rendered under the Municipal Act of 1860. <i>Groulx and The Corporation of St. Laurent</i>	11
APPEAL TO PRIVY COUNCIL 3.—The delay of six months fixed by C. S. L. C. c. 77, s. 53, during which execution on the judgment is suspended, is not absolute, but directory only, and the Court of Appeal may refuse to order the record to be remitted to the Court below to the intent that execution may be sued out, where the appellant has lodged his appeal before the Privy Council soon after the expiration of the six months. <i>Jones and Le moine</i>	161
APPEAL 4.—A judgment dismissing an inscription <i>en faux</i> on a <i>défense en droit</i> , is an interlocutory judgment in the cause, and the appeal therefrom must be prosecuted as from an interlocutory judgment. <i>Beaudry v. Corporation of Montreal</i> ..	231
APPEAL 5.—No appeal lies to the Privy Council from a judgment imposing a fine of £10 for contempt of Court. <i>Ramsay v. Regina</i>	231
APPEAL 6.—A judgment of the Court of Review rejecting the inscription of a cause for hearing in review, is final, and can only be appealed from as a final judgment. <i>Taylor v. Mullin</i>	250

	PAGE
APPEAL 7.— <i>See MUNICIPAL ACT.</i>	
APPEARANCE.—It is not necessary for the defendant to give notice of his appearance to the opposite party, in an appealable Circuit Court cause. <i>Duvernay v. Corporation of St. Barthelemy</i>	36
APPEARANCE.—When an appearance is once filed, it can only be rejected from the record on motion by the plaintiff in Court. <i>Duvernay v. Corporation of St. Barthelemy</i> ...	36
ARCHITECT.—An architect who has agreed to superintend the erection of a house for the proprietor, violates such agreement and renders it null and void by subsequently undertaking to watch over the contractor's interests for a pecuniary consideration. <i>Fahrland and Rodier</i>	83
ASSIGNEE.—Action brought by assignee to recover back usurious interest paid by assignors. <i>Dorton and Kierkowski</i>	69
AYAL, Promissory Note endorsed as. <i>Latour and Gauthier</i>	109
BORNAGE, ACTION EN. <i>O'Heir and Le moine</i>	199
BY-LAW OF MUNICIPAL COUNCIL, held to be null. <i>St. Barthelemy and Desorcy</i>	16
CAPIAS AD RESPONDENDUM.—An Affidavit for <i>Capias ad Respondendum</i> , alleging that the Defendants illegally hold in Lower Canada property of the Plaintiffs illegally obtained, and that they are secreting the same, is sufficient. <i>Royal Insurance Company v. Knapp</i>	189
CAPIAS.—A person who brings stolen property into Lower Canada and there illegally withholds it from the owner, is not liable to be imprisoned under a <i>capias</i> , because the cause of action arose out of Lower Canada. <i>Royal Insurance Company v. Knapp</i>	201
CARRIER.—Right to store, if consignee be not ready to receive cargo. <i>Watt and Gould</i>	19
CARRIER.—The liability of a Steamboat Company as common carriers does not extend to articles of wearing	

	PAGE.		PAGE.
apparel such as an over-coat, which may be thrown off and laid aside, unless specially deposited in the charge of the Company's servants. <i>Torrance v. Richelieu Navigation Company</i>	133	CONTEMPT OF COURT.—A judge who has rendered judgment in a case of Contempt of Court is not subject to be recused in any subsequent proceedings in the same cause, even where he was the complainant in the cause. <i>Ramsay v. Regina</i>	231
CASE OF ACTION.—A consignment of flour from Upper Canada was received at Montreal and there sold, and a draft was accepted by the consignee at Montreal against the consignment. <i>Held</i> , that the cause of action in a suit brought by the consignee to recover the amount overpaid on the draft, arose at Montreal. <i>O'Connor and Raphael</i>	229	CONTRACTS, inconsistent. <i>See</i> ARCHITECT.	
CESSIONNAIRE.— <i>See</i> COSTS.		CONTRAINTE PAR CORPS. <i>See</i> REBELLION A JUSTICE.	
CHOSE JUGEE.—Where a transfer of moveable and immovable property has been declared null, on a contestation of an opposition claiming the moveables, the plea of <i>chose jugée</i> is good on a contestation between the same parties of an opposition claiming the immovable property. <i>Masson v. McGowan</i>	37	COSTS.—A <i>Cessionnaire</i> is entitled to the costs of an opposition necessary for the purpose of establishing his title, though the deed of transfer be not unregistered. <i>Lacoste v. Jodoin</i>	41
CLERK OF THE CROWN, may sign indictment. <i>Regina v. Grant</i>	276	COSTS 2.—In an action of ejectment, where no rent or damages are claimed, the costs will be taxed according to the amount of the annual rent. <i>Naud and Smith</i>	59
COHABITATION.— <i>See</i> COMMUNITY.		COSTS 3.—A chirographary creditor bringing lands to sale is entitled to be collocated by privilege for costs, as in an <i>ex parte</i> action without <i>enquête</i> . <i>Eastern Townships Bank and Pacaud</i>	270
COLLISION.— <i>See</i> DAMAGES.		COSTS 4.— <i>See</i> ADVOCATE.—DISTRACTION DE FRAIS.	
COMMUNITY.—The defendant held liable for the debts of a woman with whom he cohabited for many years, and whom he held out to the world as his wife. <i>Morgan and Gauvreau</i>	248	COURT OF REVIEW.—The Court cannot order a case to be inscribed for hearing in review, without payment of the deposit required by law, even with the consent of parties. <i>Loiselle v. Loiselle</i>	37
COMPENSATION.—A claim for board and lodging is a debt <i>claire et liquide</i> , which may be pleaded in compensation to an action on an obligation. <i>Desjardins v. Tassé</i>	88	COURT OF REVIEW.—The deposit made to have a judgment reviewed will be retained to abide the final judgment, when an appeal is taken from the judgment in review. <i>Ryland v. Routh</i>	44
COMPLAINTE, ACTION EN.—The possession of a year and a day, upon which may be founded an action <i>en complainte</i> , must immediately precede the <i>trouble</i> complained of, and must be continuous. <i>Guillemette and Larochelle</i>	111	COURT OF REVIEW.—The Court of Review, in revising a judgment homologating a report of distribution, cannot order a larger sum to be paid over to an opposant than that awarded to him in the original report, until he shall first have been collocated for said larger sum in a report of distribution duly published. <i>Eastern Townships Bank and Pacaud</i>	271
COMPLAINTE.— <i>See</i> POSSESSORY ACTION.		CROWN CASES RESERVED.—No question of law can be reserved under C.S. L.C., c. 77, s. 57, unless there has been a trial and conviction. <i>Regina v. Paxton</i>	162
COMPOSITION.—Note given to a creditor by an insolvent to induce him to sign a deed of composition, held to fall within the said deed, as it bore date previous thereto. <i>Quære</i> as to plea to action on such note. <i>Evans and Cross</i>	79	CULLER.—A licensed culler, employed by the Supervisor, cannot recover payment for any other measurement of timber than that directed by the Statute, even when specially	
CONCLUSIONS OF DECLARATION.—Conclusions asking for interest upon interest may be refused by the Court, without dismissing the action. <i>Dionne and Valteau</i>	112		

	PAGE.
directed by the owner of the timber to measure it in some other way. <i>Cook and Verrault</i>	182
DAMAGES.—The Crown held liable for damages caused by the erection of Public Works. <i>Ellice and Regina</i>	11
DAMAGES.—An action of damages was brought by the proprietor of a barge, against the owner of a steamboat which ran against the barge. <i>Held</i> , that as the barge was improperly lying across the channel, no damages could be recovered. <i>Black and Lefebvre</i>	13
DEMURRER.—See PRESCRIPTION. EXCEPTION A LA FORME.	
DEPOSIT.—See COURT OF REVIEW.	
DISCUSSION, proof of, required; effects to be discussed need not be pointed out. <i>DeBeaujeu and Deschamps</i>	68
DISTRACTION DE FRAIS. <i>Eastman v. Roland</i>	216
EJECTMENT. See LESSOR AND LESSEE. COSTS.	
EVIDENCE.—It is not necessary, in an action on a promissory note, <i>ex parte</i> , to prove an alleged partnership between the plaintiffs or between the defendants. <i>Foley and Forester</i>	16
EXCEPTION TO THE FORM.— <i>Held</i> , that where essential matter is merely imperfectly stated, and not entirely omitted, the defendant should attack the declaration by an <i>exception à la forme</i> , and not by a <i>défense en droit</i> . <i>Walker and The Corporation of Sorel</i>	22
EXECUTION.—A plaintiff executing a judgment has no right to enter the defendant's house with the bailiff. <i>Hubert v. Deslauriers</i>	41
EX PARTE ACTION. See EVIDENCE.	
EXPERTS.—The proceedings of experts are null and void, if notice has not been given by them to both parties. <i>Wardle and Bethune</i>	18
EXTRADITION.— <i>Held</i> , that a warrant of commitment under the Extradition Treaty, which omits to state that the accused was brought before the magistrate, or that the witnesses against him were examined in his presence, is bad upon the face of it, and must be set aside. <i>Ex parte Brown</i>	23
FAITS ET ARTICLES. See PRACTICE.	
FALSE IMPRISONMENT.—Justices held liable in damages for illegal commitment. <i>Bissonette and Bornais</i>	18
FELONY.—A new trial after conviction of felony cannot be granted. <i>Regina v. Daoust</i>	29

	PAGE.
FORECLOSURE.—The Court will, in its discretion, permit the defendant, on payment of costs, to file a plea after foreclosure. <i>Sheridan v. Bourne</i>	40
FRAUDULENT INTENT.—A conviction for obtaining a signature to a promissory note, with intent to defraud, cannot be sustained, where the evidence merely shows that the defendant obtained the signature on promising to pay a certain consideration a few days after, which he failed to do; and also that the parties had other similar transactions together, in which the defendant met his engagements. <i>Regina v. Pickup</i>	35
FRAUDULENT SALE.—A transfer of moveable and immoveable property by an insolvent to his brother held fraudulent and null. <i>Masson v. McGowan</i>	37
HUSBAND AND WIFE. See WITNESS.	
HYPOTHECARY ACTION.—The Plaintiff in a hypothecary action must prove that the grantor of the mortgage was proprietor of the immoveable hypothecated at the time when the mortgage was granted. <i>Renard and Proulx</i>	126
INDICTMENT.—It is sufficient if an indictment be signed by the Clerk of the Crown. <i>Regina v. Grant</i>	276
INFORMATION AGAINST CITY COUNCILLOR. In an information for the purpose of testing the right of a City Councillor to exercise the office, the petitioner must allege that he is "a citizen qualified to vote at the election of Councillor for some ward of the city," and it is not sufficient for the petitioner (in this case the unsuccessful candidate) to allege his own qualification for the office of Councillor. <i>Dubord v. Lanctot</i>	89
INJURIOUS WORDS. <i>Held</i> , that the use of the words <i>paie tes dettes</i> by a creditor to his debtor, on the public street, in the hearing of the passers by, gives ground for an action of damages. <i>Rolland and Jodoin</i> ..	20
INSOLVENCY.—An insolvent, within a few months previous to the time he stopped payment, made large purchases from several parties, and at the same time was borrowing at from a half to one per cent. per week. He had made no balance sheet for two years previous to his suspension. <i>Held</i> , that the Court could not refuse to confirm his dis-	

	PAGE.		PAGE.
charge on these grounds, in the absence of proof that he made the purchases knowing that he was insolvent, and in contemplation of insolvency. <i>Ex parte Thurber</i> ...	129	an accidental fire. <i>Samuels and Rodier</i>	272
INSOLVENCY.—Discharge of a debtor under the Insolvent Act refused, where it was proved that he had granted fraudulent preferences, and had traded extensively without capital, though without the intention of committing fraud. <i>Ex parte Watt</i>	284	LESSOR AND LESSEE.—Notice to put a lessor <i>en demeure</i> to fulfil a stipulation of the lease. <i>Prevost and Desrochers</i>	82
INSOLVENCY.—After the appointment of an assignee in compulsory liquidation, the insolvent cannot retain for his personal expenses moneys paid in to the estate. A trader who buys goods on credit, impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency. The vendor on credit is not supposed to contemplate the escape or the bankruptcy of his debtor, by reason of a state of insolvency actually existing at the time of the purchase. The discharge of a trader who has granted a fraudulent preference to a creditor, must be absolutely refused. The examination of an insolvent before the assignee may be used against him by a creditor contesting his discharge. <i>Ex parte Tempest</i>	276	LESSOR AND LESSEE.—A lease prohibited sub-letting, but the lessor's agent received the rent from the sub-tenants for more than a year without objection. <i>Held</i> , that this was equivalent to an acquiescence in the sub-lease. <i>Owler and Moreau</i>	84
INSURANCE.—A policy of insurance was indorsed to the effect that in the event of any change in the occupation of the premises insured, of a nature to increase the risk, the insured should be bound to give notice thereof to the Company in writing. The premises were occupied as a saloon without notice to the Company. A fire having occurred:— <i>Held</i> , that the policy was voided. <i>Campbell v. Liverpool and London Insurance Company</i> ..	224	LESSOR AND LESSEE.—Action by tenant for excess of manure on the land at the time when lease was cancelled. <i>Grant and Lochhead</i>	106
INTERLOCUTORY JUDGMENT. <i>See</i> APPEAL.		LESSOR AND LESSEE.—An action of ejectment cannot be brought under the Act C. S. L. C. cap. 40, respecting Lessors and Lessees, unless there be a lease, or a holding by permission of the proprietor, without lease, i. e. unless the relation of landlord and tenant exists between the parties. <i>Doran v. Duggan</i> ...	127
LEASE.—Where a fire occurring during the lease renders the premises leased temporarily uninhabitable, but does not totally destroy them, the tenant is entitled to hold possession and to resume occupation of the premises as soon as repaired. <i>Samuels and Rodier</i>	272	LESSOR AND LESSEE.—A gardener engaged at monthly wages, with the right of occupying a tenement free from rent as long as he should continue to hold the situation, is a lessee within the Act respecting lessors and lessees. <i>Hart v. O'Brien</i>	187
LEASE.—A tenant though bound by the lease to make all repairs himself, is not bound to repair the leased premises if seriously injured by		LESSOR AND LESSEE.—An action may be brought by the lessor to compel the proprietor to make repairs, though he only became proprietor during the lease. <i>Sache and Courville</i>	251
		LICENSE.—As to interpretation of license to cut timber. <i>Bryson and Stutt</i>	81
		LIMITATIONS. <i>See</i> PRESCRIPTION.	
		LODS ET VENTES.—Action for <i>rente constituée</i> representing <i>lods et ventes</i> . <i>Lalonde and Brunet</i>	19
		MASTER AND SERVANT.—An employee of a Railway Company has no action against the Company for damages, where the injury is caused by the negligence of a fellow-servant, while both are acting in pursuance of a common employment. <i>Bourdeau v. Grand Trunk Railway</i>	186
		MORTGAGE.—Amount due under mortgage sufficiently specified. <i>Prevost v. Poirier</i>	40
		MORTGAGEE OF VESSEL.—A mortgagee of a vessel advancing moneys to the shipbuilder to enable him to complete it, is not liable for the	

	PAGE
price of goods sold to the ship-builder for the purpose of furnishing the vessel. <i>Freer and Ma-guire</i>	104
MUNICIPAL COUNCIL.—Land cannot be taken by a Municipal Council for the purpose of making a road till it has been valued by valuator. <i>Deal v. Corporation of Philips-burg</i>	41
MUNICIPAL ACT.—The amending Act 24 Vict. c. 29, amending the L. C. Consolidated Municipal Act, is to be read together with the original Act, and there is no appeal from decisions under it. <i>Hotel Dieu and St. Jean Baptiste</i>	160
MUNICIPAL ACT. See APPEAL.	
M ^r MITOYEN.—Damages in consequence of privy built against <i>mur mi-toyen</i> . <i>Beaudry and Roy</i>	20
NEGLIGENCE.—Damages refused, where the injury was the result of pure accident, and no negligence could be imputed to the defendants. <i>Montreal City Passenger Railway Company and Bignon</i>	121
NEW TRIAL. See FELONY.	
NOVATION.—An agreement to give discharge in full to insolvent "on payment of composition within six weeks" effects novation, though composition be not paid. <i>Tees v. McCulloch</i>	135
OBTAINING GOODS WITH INTENT TO DEFRAUD.—The defendant was indicted for obtaining goods from <i>T. W. R.</i> with intent to defraud, and convicted on evidence that showed that he had obtained from <i>T. W. R.</i> an order for the delivery of the goods, promising to pay cash, but failing to do so, and becoming insolvent a few days after. He had had other transactions with <i>T. W. R.</i> and had met his engagements in them. <i>Held</i> , that the conviction was sustained by the evidence and could not be disturbed. <i>Regina v. McDonald</i>	34
OPPOSITION.—A person holding property merely as an agent cannot file an opposition <i>afin de distraire</i> in his own name. <i>Pennoyer and Butler</i>	21
PARTNERSHIP.—An unfulfilled promise to admit an employee to a share of the partnership business, held not to make the employee liable to share in the losses. <i>Farrell v. Glassford</i>	37
PARTNERSHIP.—B. and H. being sued jointly as the firm of B. & H., H.	

	PAGE
pleaded that the firm was composed of himself and B.'s wife. The partnership was not registered, and credit was given to B. and H., the reputed partners. <i>Held</i> that H. was liable. <i>Tourville v. Bell</i>	41
PARTNERSHIP.—The debtor of a firm cannot set off against the partnership claim a debt due to him by one of the partners. <i>Rolland v. St. Denis</i>	110
PARTY IN A CAUSE. See WITNESS.	
PAUPER. See APPEAL IN FORMA PAUPERIS.	
PAYMENT. Banking institutions are not liable for any deficit in packages of silver paid out by them, unless the silver be counted and the deficit made known before the packages are taken from the Bank. <i>Brown v. Quebec Bank</i>	253
PAYMENT.—Note paid by goods. <i>Angers and Ermatinger</i>	158
POSSESSORY ACTION.—In order to maintain an action <i>en complainte</i> , the plaintiff must have had exclusive and uninterrupted possession of the property during the year and day previous to the institution of the action. <i>Morin and Palsgrave</i>	111
POSSESSORY ACTION.—See COMPLAINTE.	
PRACTICE.—The Court may discharge a <i>délibéré</i> , and order the case to be inscribed on the <i>rôle d'enquête</i> for the purpose of allowing the plaintiff to complete his answers to interrogatories <i>sur faits et articles</i> , where the interrogatories have not been answered properly at first. <i>Jones and Lemoine</i>	16
PRACTICE.—Special answer. Defects in declaration not supplied by allegations of special answer. <i>Gibson and Moffatt</i>	60
PRACTICE. See APPEARANCE.	
PREScription.—The Statute of Limitations must be pleaded by an exception, and cannot be put in issue by a demurrer. <i>Wilson and Demers</i>	252
PREScription OF TEN YEARS. <i>Hogle and McCorkill</i>	108
PRINCIPAL AND AGENT.—Agents who do not disclose the names of their principals (who are individually unknown to the creditor) are personally liable. <i>Lovell and Campbell</i>	131
PROMISSORY NOTE.—The holder of a promissory note who has alleged that his title thereto is derived from an endorsement, which is afterwards	

	PAGE.		PAGE.
proved to be a forgery, even although he may be acting in good faith, cannot recover the amount of the note from any of the previous endorsers. <i>Larue and Beanturel</i>	112	SALE.—The Court will not adjudicate upon a demand to annul a deed of sale, where persons interested in the deed have not been made parties to the suit. <i>Lemoine v. Lironais</i>	163
PROMISSORY NOTE. See EVIDENCE.		SALE.—Where goods such as iron, are sold as merchantable and in good order, the purchaser may claim a deduction for the damaged condition of the goods, though he made an examination before receiving them, to test the quality. <i>Benson v. Mulholland</i>	185
RAILWAY COMPANY, held not liable for animals killed on the track, the accident having occurred in winter while the fences of the owner were down. <i>Montreal and Champlain Railroad Company and Perras</i>	17	SEPARATION DE BIENS.—Held, that an action en <i>séparation de biens</i> may be instituted in the district where in the defendant is summoned by personal service, according to C. S. L. C., cap. 82, sec. 26. <i>Harnois and St. Jean</i>	19
REBELLION A JUSTICE.—Held, that a return made by the Sheriff of <i>rebellion a justice</i> is sufficient evidence to justify the Court in making a rule against the defendant, for <i>contrainte par corps</i> , absolute, where the defendant does not appear. C. S. L. C. cap. 83, sec. 143—145. <i>Crebassa and Masue</i>	22	SERVICE.—Notice taken by Court of Appeals of defective return of service. <i>Woodman and Gendier</i>	200
REPORT OF DISTRIBUTION. See COURT OF REVIEW.		SERVICE.—Under C. S. L. C. cap. 83, sec. 57, in cases of <i>saisie gagerie</i> , etc., it is sufficient service of the declaration to leave a copy at the prothonotary's office, and it is not necessary that the ordinary delays for service should be allowed between such service of declaration and the return of the action. <i>Brahadi and Bergeron</i>	67
REVENDIGATION.—A person cannot revendicate property as the owner thereof, and at the same time bring an action for the price for which he sold the said property. <i>Gibson and Moffatt</i>	67	SLANDER.—The use of the term 'loafer' is slanderous, and gives ground for damages. <i>Lighthall v. Walker</i>	43
REVENDIGATION by proprietor of piano sold at a judicial sale of the effects of the lessee. <i>Nordheimer v. Duplessis</i>	105	USAGE.— <i>Droit d'usage</i> of timber on communal land. <i>Bate St. Antoine and Loeau</i>	154
REVIEW, COURT OF.—The Superior Court sitting as a Court of Review, has no power under the statute to revise judgments in cases which are not susceptible of an appeal. <i>Taylor v. Mullin</i>	200	USURIOUS INTEREST. See ASSIGNEE.	
SAISIE-ARRÊT.—The Court cannot, in a contestation upon a <i>saisie-arrêt</i> , look into accounts between the garnishee and a party not in the record, in order to determine what may be due from the garnishee to the defendant. <i>Ireland v. Gregory</i>	132	WARRANT OF COMMITMENT.—A formal warrant of commitment may be substituted for an informal one, and the substitution need not be mentioned in words in such substituted warrant. <i>Regina v. Murray</i>	87
SALE.—A person sold certain timber to two different parties who both had possession. Held, that the title of the first purchaser prevailed over that of the second. <i>Russell v. Guertin</i>	42	WARRANT OF COMMITMENT.—See EXTRA-DITION.	
SALE of property under seizure. <i>Burroughs and Kiernan</i>	108	WITNESS.—The statute prohibiting husband and wife from being examined for or against each other in civil cases suffers no exception where the husband is the sole agent of his wife, a <i>marchande publique</i> , and sole manager of her business under a power of attorney. <i>Ireland v. Duchesnay</i>	227
SALE.—Deed of sale declared fraudulent, and the vendor ordered to pay over the proceeds under a <i>saisie-arrêt</i> in his hands. <i>McDonald and Nivin</i>	151	WITNESS.—Any one in public employ is entitled to be taxed as a witness; and if he is a professional man,	

	PAGE.
he must be taxed at the rate which the tariff allows to practising members of the profession. <i>Rochette v. Forques</i>	185
WRIT OF APPEAL.—Where the delay in returning a writ of appeal is caused by the neglect of the Prothonotary, and not of the appellant, the latter	

	PAGE.
may nevertheless be condemned to pay the costs of the respondent's motion to have the appeal dismissed. <i>Ferrier v. Dillon</i>	160
WRIT OF ERROR.—No writ of error lies from a judgment in a case of contempt. <i>Ramsay v. Regina</i>	231

INDEX TO THE SELECTIONS FROM THE ENGLISH LAW REPORTS
CONTAINED IN THIS VOLUME.

	PAGE
Act of Bankruptcy—Fraudulent Assignment.....	94
Action for Reward.....	216
Adultery—Judicial separation.....	120
Adultery of Husband—Misconduct of wife.....	142
Agent, Principal and.....	118
Alien—Copyright.....	92
Alimony—Examination of Husband....	47
Alimony, permanent.....	263
Alveus of a running stream.....	173
Ancient Lights.....	48
Appeal to Privy Council.....	174
Auction, Sale at—Puffers.....	48
Bailment of Pawn or Pledge—Interest under original Pledge not determined by Repledge.....	254
Ballet Divertissement.....	139
Bankruptcy—Fraudulent Assignment 94; Deposit of Policy 115; Secret Bargain 115; Official Assignees 142; Action for false representation.....	262
Bible, Family.....	179
Bill of Exchange—Indorsement “in need” 95; Acceptance for honor....	258
Bill of Lading—Power to Shipowner to land goods.....	119
Bill of Lading.....	177
Blockade, breach of.....	47
Booty of War.....	263
Bottomry Bond.....	47
Breach of Promise of Marriage.....	178
Carrier—Inequality of Charge 140; Measure of Damages.....	178
Carriers—Delivery within reasonable time.....	256
Carriers by Railway—Undue prejudice .	260
Charity—Grammar School.....	114
Charter party—Substituted contract....	261
Codicil, insertion of clause by consent..	180
Collection of parcels.....	260
Committant and Préposé, definition of..	176

	PAGE
Commissioners for a public purpose, liability of.....	256
Company—Application for shares 93; Contract to take shares 116; Forfeiture of shares 118, 142; Shares taken by Executors 143; Authority of Directors	262
Companies' Act—Prospectus—Misrepresentation.....	144
Composition—Bankruptcy—Secret bargain.....	115
Consideration, nominal.....	116
Contempt of Court.....	241
Contract, construction of, 261; Void for immorality 178; Illegality—Wager..	179
Conviction, proof of.....	260
Copyright—Alien—Temporary residence within the Realm 92; Directory.....	177
Corporation—Public Improvements 168; Contract not under seal 255; Damages.	173
Costs—Unsuccessful opposition to Will.	141
Covenant—Nullity of Marriage.....	179
Damage, measure of—Trade mark.....	117
Damage by Fire, proximate cause.....	177
Damages—Corporation 173; Fraudulent misrepresentation.....	260
Deed, attestation of.....	118
Demurrer— <i>Res Judicata</i>	94
Descent, rules of.....	256
Directory—Copyright.....	177
Discharge of Jury, effect of.....	136
Disorderly House.....	141
Dissolution of Marriage 180; Cruelty—Drunkennes.....	181
Divorce in Scotland—Marriage in England.....	117
Escape, action against Sheriff.....	257
Evidence, parol, admitted to explain ambiguity in will.....	45
Executors, shares taken by.....	143
Family Bible.....	179
False Pretences—Intent.....	141
Felony—Discharge of Jury.....	136

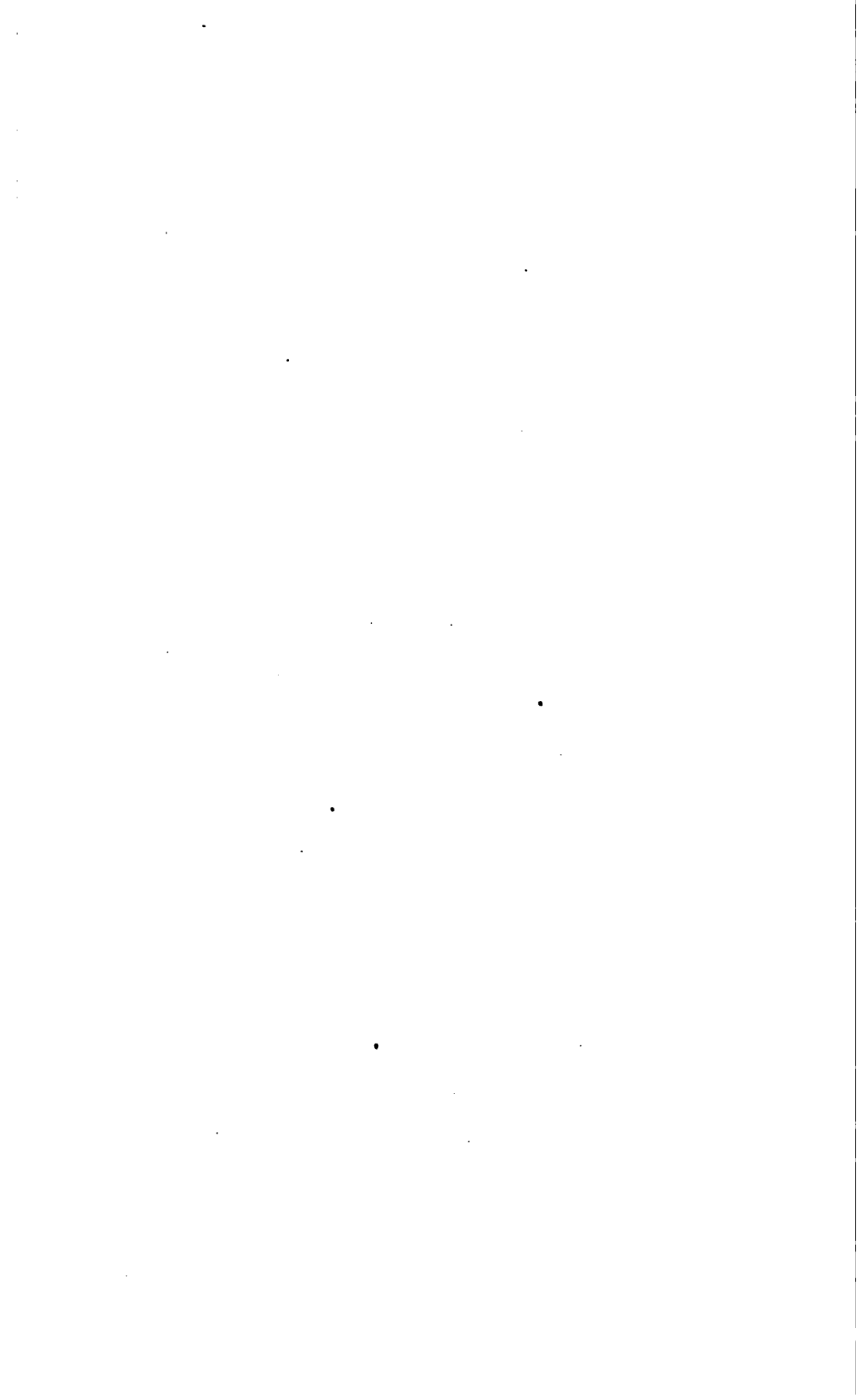
	PAGE		PAGE
Fiduciary relation—Vendor and Purchaser	144	Neutral, blockade-running.....	47
Frauds, Statute of, 142, 257; Part, Performance 92; Parol variation of a written contract.....	140	Nuisance—Master and Servant 255; Sale 93; Negligence 119; Sewage.....	115
Fraudulent assignment.....	94	Nullity of Marriage.....	46, 179
Gift, incomplete.....	72	Parol acceptance of written proposal 288; Agreement—Tenancy 168; Declaration of Trust.....	72
Grammar School.....	114	Partnership—Agency—Perception of profits 119; Specific performance 144; Liability of New Firm for debts of old.	174
Immoral purpose.....	176	Patent—Joint Grantees 92; Prolongation of Term.....	175
Indorsement "in need"—Bill of Exchange.....	95	Pawn or Pledge, bailment of.....	254
Infant—Religious Education.....	143	Policy—Bankruptcy 115; Marine.....	178
Influence, undue.....	143	Polygamy—Mormon marriage.....	180
Information leading to apprehension of offender.....	216	Pretences, false—Intent.....	141
Injunction—Board of Health.....	95	Principal and Agent 118; Pre-payment 139; Sale by Auction 181; Extent of Authority—Secret Limit.....	283
Insolvency—Foreign Court 143; Partnership.....	174	Principal and Surety.....	140, 259
Insurance—Proximate cause of Loss or Damage.....	177	Promissory Note.....	181
Insurance, Marine 216; Implied Warranty of Seaworthiness.....	257	Prostitution of Wife by coercion of Husband.....	142
Insurance Company—Lost Policy.....	143	Public Company—Forfeiture of Shares.....	142
Interest, disqualifying.....	135	Public Improvements—Corporation.....	168
Interest in Justices sitting upon the Inquiry.....	218	Railway—Lands injuriously affected 119; Carrier, Inequality of Charge.....	140
Joint Stock Company—Shares taken by Executors.....	143	Railway Company—Level crossing 135; Duty of, in keeping a level crossing 24, 44; Acceptance of Bills of Exchange by 258; Inequality of charge for "Packed Parcels".....	45
Judicial Separation—Adultery.....	120	Rape—Idiot—Consent.....	180
Jury, discharge of, effect of.....	136	Receiving—Delivery by owner 141; Joint Indictment.....	179
Justice of the Peace—Disqualifying interest.....	135	Release—Covenant.....	116
Land-owners, adjoining.....	260	<i>Res Judicata</i> —Demurrer.....	94
Lateral support, right to.....	260	Riparian Ownership—Alveus of a running stream.....	173
Letters Patent—Prolongation of term.....	175	Sale—Nuisance.....	93
Level crossing on a Railway, duty of Company in keeping.....	24, 44	Sale by Auction—Principal and Agent 181; Re-sale.....	175
Libel—Inadequacy of Damages 255; Matter of public interest.....	255	Salvage—Contract to tow.....	263
Light—Lateral Obstruction.....	91	Seaman's Will—Surgeon in the Navy.....	115
Lights, ancient.....	48	Sewage—Nuisance.....	93
Limitations, Statute of—Acknowledgment.....	288	Shares, application for—Minute book.....	257
Marine Insurance 259; General average.....	216	Sheriff 263; Escape—Measure of damages	257
Marriage, Dissolution of, 46, 142, 180; Nullity of; 180; Malformation of woman.....	46	Ship—Proof of ownership <i>prima facie</i> evidence of employment of those on board	254
Marriage in England—Divorce in Scotland.....	117	Shipping—Marine policy 178; Charter party 261; Marine Insurance 259; Deviation.....	262
Master and Servant—Nuisance 255; Liability for damage 176; Second offence 181; Negligence of fellow-servant—Common employment 135; Negligence of fellow-servant.....	178	Signature to Will, position of.....	45
Master of vessel, expenses incurred by.....	263	Solicitor—Liability of Trustee.....	95
Master's wages—Maritime Lien.....	36	Specific Performance.....	143
Money paid.....	259	Statute of Frauds 262; Part performance 92—Contract to answer for the debt or default of a third person 139—Agreement to make Will 142—Memorandum of the bargain 257—Parol Acceptance	288
Mormon Marriage—Polygamy.....	180	Statute of Limitations—Acknowledgment	288
Negligence—Unfenced hole 177; Dangerous instrument 179; Nuisance 119; Railway—Level crossing 24; Injury to foot passenger—Absence of protection for carriage traffic 44; Of fellow-servant.....	135	Stoppage in transitu.....	257

	PAGE		PAGE
Succession, irregular.....	176	Vendor, unpaid—Stoppage <i>in transitu</i> ..	257
Succession Duty.....	48	Vice-Admiralty Court.....	174
Surety—Increase of the duties of the principal debtor.....	140	Wager—Illegality.....	179
Tender under protest.....	261	Warranty on sale of horse.....	240
Threat to accuse of an infamous crime.....	141	Will 181—Ambiguity—Parol evidence 45—Position of Testator's signature 45—Seaman's will 45—Revocation—Two partly inconsistent wills admitted to Probate 141—Codicil 142—Knowledge and approval of its contents 142—Gift, original and substitutional 173—Construction of 177—Attestation of 288—Clause following signature.....	288
Trade Mark 142—Measure of Damage 117—Use of particular numbers.....	144	Witness—Incompetency.....	179
Trespass—Duty of owner of land.....	262		
Trial, second.....	136		
Trustee—Fraud—Solicitor.....	95		
User—Dedication.....	116		
Undue Influence—Confidential relation.....	143		
Vendor and Purchaser 258—Fiduciary relation 144—Sale by auction.....	48		

INDEX TO MISCELLANEOUS MATTERS CONTAINED IN THIS VOLUME.

	PAGE.		PAGE.
Action <i>qui tam</i>	243	Dorion (Mr. J. B. E.), Assault on, in the House of Assembly.....	56
American Law Register, The.....	197	Driscoll Contempt Case, The.....	267
American Law Review, The.....	101	Ejectment, Actions in.....	58
Admissions to practice.....	102, 220	English Law Courts.....	7
Admissions to study.....	102, 220	Erle, Chief Justice.....	147
Advocate conducting his own case.....	222	Executions, Mr. Morris' Bill for Private.....	29
Appeals, March Term, 1866.....	5	Executions, Private.....	24
Appeals <i>in forma pauperis</i>	145	Extradition of Lamirande.....	73, 97
Appointments, Legal.....	59	Felony, New Trial for.....	77
Assignments.....	192, 198, 220, 245, 269	Fenian Prisoners in Lower Canada, Trial of.....	126
Authority of Counsel.....	169	Grand Jury System.....	98
Bankruptcy.....	192, 198, 220, 245, 269	Habeas Corpus.....	124
Bar of Lower Canada 123; By-Laws, &c. 197; Diplomas registered 150; Proposed changes in the Act respecting the.....	1	Habeas Corpus Act.....	6
Bill of Costs, The.....	172	Holt, Judge Advocate.....	96
Bills withdrawn.....	72	Homicide, excusable.....	102
British North America Act, The.....	266	Indictments, Secret, by Grand Juries.....	101
Brougham's Advice to Macaulay.....	286	Insolvent Act, The.....	193
Bruce, Sir James L. Knight.....	148	Inspection of Registry Offices.....	28
Burrows, Trial of Mr., for manslaughter.....	101	Interest and Usury.....	3
Cairns, Sir Hugh.....	151	Judgments, Facilities for rendering.....	54
Canadian Scenery, Pye's.....	197	Judicial Labour.....	4
Code, changes in the Law effected by the.....	101	Judiciary of Lower Canada, The.....	265
Code of Civil Procedure.....	25	Jury, "agreeing to disagree,".....	270
Confederate Cotton Loan, The.....	219	Kent, Chancellor, on Contempt of Court.....	217
Contempt of Court 145; The McDermott case 241; The Ramsay case 121; Chancellor Kent on.....	217	Lafontaine, Mr. Justice.....	49
Costs, Instructions as to.....	196	Lamb, <i>In re</i>	193
Counsel, Authority of.....	169	Lamirande, The Extradition of.....	73
Cranworth, Lord, Retirement of.....	124	Lamirande, The trial of.....	148
Daoust, Mr. M.P.P.....	72	Lawless Aggressions, Act respecting.....	6
Digest of English Law.....	151	Law Magazine and Law Review.....	197
Dinner, Complimentary, by the Montreal Bar.....	103	Law Reporting, in England, Ireland, and Upper Canada.....	77
		Lawyers, lowly origin of distinguished.....	2
		Lefroy, Chief Justice.....	125
		Legal Appointments.....	59
		Legal Appointments in Ireland.....	104

	PAGE.		PAGE
Legal Appointments in England.....	126	Privy Council.....	126
Legal Expenses in England.....	171	Punch's Legal Intelligence.....	96
Legislative Assembly, holding a stranger as prisoner.....	56	Ramsay v. Regina.....	267
Lower Canada Reports, The.....	268	Ramsay Contempt Case, The.....	217
McDermott Case, The.....	241	Ramsay's (Mr. T. K.) letter respecting Mr. Justice Drummond, and the Ex- tradition of Lamirande.....	75
Mack, The Case of.....	122	Regina v. Burrows.....	101
Magic and Witchcraft.....	79	Regina v. Daoust.....	103
Megantic, County of.....	219	Registration Duties.....	59
Meredith, appointment of Mr. Justice, as Chief Justice of the Superior Court.....	6	Registry Offices, Inspection of.....	28
Montreal Bar, suggested amendments of Code of Civil Procedure by the.....	25	Reporting extraordinary.....	169
Montreal Bar, Annual Report.....	285	Retainers.....	169
New Publications.....	101, 197	Revision Court at Montreal.....	270
Notarial Deeds not countersigned.....	28	Royal Insurance Company v. Knapp....	219
Ottawa District.....	29	Testamentary Brevity.....	222
Ottawa District, The Judge of the.....	49	Upper Canada Law List.....	29
Pollock, Chief Baron.....	103	Usury, Interest and.....	3
Post Office Regulations.....	197	Wax Tapers at Funeral Ceremonies....	199
Price of Justice, The.....	99	Wright's (Mr.) Speech respecting Mr. Justice Lafontaine.....	53
Prisoner in the House of Assembly, A.....	56	Writs of Attachment.....	192, 199, 221
Private Executions.....	24		





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